

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(1) NATURE AND DEFINITION OF TORT/401. Rights of action in tort.

## **TORT (VOLUME 97 (2010) 5TH EDITION)**

### **1. THE GENERAL LAW OF TORT**

#### **(1) NATURE AND DEFINITION OF TORT**

##### **401. Rights of action in tort.**

Rights of action in tort are civil rights of action which are available for the recovery of unliquidated damages<sup>1</sup> by persons<sup>2</sup> who have sustained injury or loss from acts or omissions of others in breach of duty or contravention of right<sup>3</sup> imposed or conferred by law<sup>4</sup>, rather than by agreement<sup>5</sup>. The nature of tort is further illuminated by way of its distinction from other legal categories. The principal distinctions to be drawn are between torts and crimes<sup>6</sup> and between torts and other civil wrongs<sup>7</sup>.

1 Other remedies, eg injunctions, orders for restitution or recovery of possession and declarations are also available in appropriate cases, but the right to unliquidated damages is the only remedy which is common to all rights of action arising from tortious conduct.

2 'Person' in this context includes every person recognised by the law as being capable of owing a duty to some other person and of committing a breach of the duty. It includes not only individuals and bodies corporate, but all persons associated together in such a way or for such a purpose as will create the duty. As to special rules applicable to particular persons see PARA 418 et seq.

3 It is a well established legal principle that violation of a legal right committed knowingly creates a cause of action: see *Best v Samuel Fox & Co Ltd* [1952] AC 716 at 729, [1952] 2 All ER 394 at 397, HL, per Lord Goddard CJ (citing *Lumley v Gye* (1853) 2 E & B 216; *Rogers v Rajendro Dutt* (1860) 13 Moo PCC 209; *Quinn v Leathem* [1901] AC 495, HL).

4 The principal reference made here by the use of the words 'by law' is to the common law. The civil action for breach of statutory duty is a common law action (see further PARA 495 et seq), but statute may also confer a right of civil action analogous to a common law right of action in tort (see eg the Consumer Protection Act 1987 Pt I (ss 1-9); and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 518 et seq).

5 Although the description 'by agreement' primarily refers here to contract, it is intended also to cover rights of action arising from bailment. It is clear that a right of action for breach of contract and a right of action for tort are distinct rights.

6 See further PARA 403.

7 See further PARA 404.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(1) NATURE AND DEFINITION OF TORT/402. The structure of the law of tort.

##### **402. The structure of the law of tort.**

The structure of the modern law of tort reflects its historical origins in the old system of the forms of action. Tort law today is divided into distinct domains, for example trespass, nuisance

and negligence, which correspond with particular forms of action in the old law. Some jurists have consequently preferred to consider this branch of the law as a body of only loosely connected principles establishing specific liabilities (a law of torts)<sup>1</sup> rather than a coherent set of liability rules deriving from a general principle that it is tortious to injure another person without legal justification (a law of tort)<sup>2</sup>. However, whichever of these alternative analyses is preferred, it seems indisputable that from time to time in the past the common law has recognised new duties and liabilities and has the capacity to do so in the future<sup>3</sup>, although a cause of action must be found either in principle or on authority<sup>4</sup>.

1 This view was taken by eg Sir John Salmond: see *Salmond and Heuston on the Law of Torts* (21st Edn, 1996) pp 15-18.

2 This view was taken by eg Sir Percy Winfield: see Winfield *Province of the Law of Tort* (1931), ch 3.

3 See eg *Ashby v White* (1703) 2 Ld Raym 938 (right to vote); *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995 (private information). The development of the law in this area may be affected by the Human Rights Act 1998: see PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

For instances where the common law has rejected new liabilities see PARA 412 et seq.

4 See *Best v Samuel Fox & Co Ltd* [1952] AC 716 at 730, [1952] 2 All ER 394 at 397, HL, per Lord Goddard.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(1) NATURE AND DEFINITION OF TORT/403. Distinction between tort and crime.

### 403. Distinction between tort and crime.

A crime is an unlawful act or default which is an offence against the public, and renders the person who is guilty of the act or default liable to legal punishment<sup>1</sup>. The same act or omission may be both a crime and a tort, for the duty giving rise to a potential claim for damages against the tortfeasor may co-exist with a duty imposed for the benefit of the public, a breach of which gives rise to a criminal offence<sup>2</sup>. Where a person is convicted of a criminal offence, the court of criminal jurisdiction may make an order requiring the offender to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence<sup>3</sup>. A person who has sustained personal injury directly attributable to a crime of violence, an offence of trespass on a railway, or the apprehension or attempted apprehension of an offender or suspected offender, the prevention or attempted prevention of an offence, or the giving of help to any constable who is engaged in any such activity may also claim a payment of compensation from the Criminal Injuries Compensation Authority<sup>4</sup>.

1 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 1-2.

2 Certain acts of trespass, for example, are actionable in tort and are also crimes (see PARA 524 et seq); so are public nuisances (see **NUISANCE** vol 78 (2010) PARAS 174, 187 et seq); and defamatory libels (see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 288 et seq). The Criminal Law Act 1967 s 1 repealed the former rule that, if the act were also a felony, no action could be brought until the defendant had been prosecuted for felony.

3 See the Powers of Criminal Courts (Sentencing) Act 2000 s 130; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 375 et seq. See also PARA 474; and **TORT** vol 45(2) (Reissue) PARAS 682-683.

4 See the Criminal Injuries Compensation Act 1995; Criminal Injuries Compensation Authority *The Criminal Injuries Compensation Scheme* (2008); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(1) NATURE AND DEFINITION OF TORT/404. Distinction between tort and other private law categories.

#### **404. Distinction between tort and other private law categories.**

The same circumstances may give rise to concurrent claims in tort and for other private law wrongs, including breach of contract<sup>1</sup> and unjust enrichment<sup>2</sup>.

Remedies in contract and tort may exist concurrently and arise on the same facts<sup>3</sup>. A claimant may rely on the more advantageous remedy unless the remedy in tort is so inconsistent with the contract that it must be taken to be limited or excluded<sup>4</sup>. Damages in tort are assessed on the assumption that the tort was not committed; damages in contract are assessed on the assumption that the contract would be performed<sup>5</sup>.

Where facts are such as to give a person a right of action in tort or a right of action in restitution for money had and received, he may elect to pursue the remedy in restitution, but judgment and satisfaction in respect of the restitutionary claim bars the right to sue in tort<sup>6</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARAS 608-609. For the importance of the distinction see **CIVIL PROCEDURE**.

2 See **RESTITUTION**.

3 See *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193, [1994] 3 All ER 506 at 532, HL, per Lord Goff of Chieveley (disapproving contrary dicta in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 107, [1985] 2 All ER 947 at 957, PC).

4 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 194, [1994] 3 All ER 506 at 532-533, HL, per Lord Goff of Chieveley.

5 See **DAMAGES** vol 12(1) (Reissue) PARA 819.

6 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL. See further PARA 472.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(1) NATURE AND DEFINITION OF TORT/405. Fault in tort law.

#### **405. Fault in tort law.**

Liability in tort is normally premised on the fault of the defendant or someone for whom the defendant is responsible<sup>1</sup>. Fault may consist in negligence, which is the failure to exercise that care which the circumstances demand<sup>2</sup>, or the intentional infliction of injury (including injury without actual damage)<sup>3</sup>. Torts involving the intentional infliction of injury may involve a more extensive or more onerous liability than torts of mere negligence<sup>4</sup>.

The unlawfulness of conduct does not necessarily entail fault in English law, though unlawfulness is an element of some tortious liabilities<sup>5</sup>.

Strict and absolute liability (ie liability without fault) is rare in the modern law<sup>6</sup>.

1 Eg through vicarious liability: see PARAS 506, 698 et seq.

2 See PARA 491.

- 3 See PARA 492.
- 4 See PARA 492.
- 5 See PARA 493 et seq.
- 6 As to strict and absolute liability see PARAS 522-523.

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## (2) HYBRID OR AMBIGUOUS FORMS OF LIABILITY

### 406. Tort or other category of wrong.

Certain civil wrongs are hard to ascribe exclusively to the law of tort as opposed to some other class of obligation<sup>1</sup>. Some of them may give rise to concurrent rights of action, being remediable by a claim in tort or for breach of some other obligation, at the claimant's election<sup>2</sup>. Others may not generate a tortious liability at all and may best be regarded as sui generis<sup>3</sup>.

- 1 As to the interrelation of claims in tort and for breach of contract see PARA 404; and **CONTRACT** vol 9(1) (Reissue) PARA 609. As to the nature of liability for breach of statutory duty see PARAS 495-497.
- 2 For example, the breach of a bailee's duty of care: see PARA 407; and **BAILMENT**.
- 3 For example, the liability of the innkeeper for the safety of guests' property: see PARA 411; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 197 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(2) HYBRID OR AMBIGUOUS FORMS OF LIABILITY/407. Bailment.

### 407. Bailment.

Bailment<sup>1</sup> is a transaction sui generis<sup>2</sup>. It is commonly, but not invariably, created by contract<sup>3</sup>. The principal common law duties of a bailee are to take reasonable care of the goods and to refrain from converting them<sup>4</sup>. Neither of these duties is peculiar to bailment<sup>5</sup> and both can normally be enforced in tort against a bailee<sup>6</sup>. Some obligations of a bailee are, however, incapable of being categorised as tortious or contractual in nature<sup>7</sup>. A claim against a bailee can therefore (according to circumstances) be brought in contract, tort or bailment<sup>8</sup>. In particular circumstances, a claim may also lie against a bailee in restitution<sup>9</sup>.

- 1 See generally **BAILMENT**.
- 2 *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 at 261, [1965] 1 All ER 163 at 167, CA, per Lord Denning MR; *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 at [48], [201] QB 1 at [48], [2009] 2 All ER 986 at [48] per Lord Judge CJ. See also **BAILMENT** vol 3(1) (2005 Reissue) PARA 1.
- 3 For example, bailment by way of carriage: see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 56 et seq.
- 4 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at 738, [1965] 2 All ER 725 at 738, CA, per Salmon LJ. As to conversion by bailees see **BAILMENT**.

5 A person can convert another's goods without being in possession of them: see PARA 601; and **TORT** vol 45(2) (Reissue) PARA 665. A duty of care can plainly be owed towards the goods of another person where the person owing the duty is not a bailee: see generally **NEGLIGENCE**. But some facets of the bailee's duty of care (eg the duty to guard against theft, or against the deliberate wrongs of third parties generally) are substantially peculiar to bailment and to certain other narrow categories of relation and are not a facet of the general law of tort: see *P Perl (Exporters) Ltd v Camden London Borough Council* [1984] QB 342, [1983] 3 All ER 161, CA; *Smith v Littlewoods Organisation Ltd* [1987] AC 241, [1987] 1 All ER 710, HL.

6 A claim against a bailee for breach of the duty of care is a claim in tort for the purposes of what are now the Limitation Act 1980 (see **LIMITATION PERIODS** vol 68 (2008) PARA 979 et seq) (*Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107), the County Courts Act 1984 (see **COURTS**) (*Turner v Stallibrass* [1898] 1 QB 56, CA) and the Postal Services Act 2000 s 90 (exclusion of liability) (see **POST OFFICE** vol 36(2) (Reissue) PARA 87) (*American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701).

7 For example, the strict liability of the bailee for loss or damage resulting from his unlawful departure from the terms of the bailment (see **BAILMENT** vol 3(1) (2005 Reissue) PARA 18) which can be visited not only on a contractual bailee but also on the unrewarded bailee under a gratuitous bailment: *Mitchell v Ealing London Borough Council* [1979] QB 1, [1978] 2 All ER 779.

8 *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86 at 90, 159 JP 770 at 774, CA, per Otton LJ.

9 See **DAMAGES** vol 12(1) (Reissue) PARA 1088. See generally **BAILMENT**.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(2) HYBRID OR AMBIGUOUS FORMS OF LIABILITY/408. Agent's warranty of authority.

#### 408. Agent's warranty of authority.

Claims against an agent for breach of warranty of authority<sup>1</sup> have been variously classed in the past as claims in tort<sup>2</sup>, quasi-tort<sup>3</sup>, and quasi-contract<sup>4</sup>, or even as sui generis<sup>5</sup>, distinct from both contract and tort. The preponderance of case-law authority, however, treats them as contractual<sup>6</sup>. In appropriate circumstances, a claim may also be sustainable against the agent in tort for negligent misstatement<sup>7</sup>.

1 See PARAS 431, 704; and **AGENCY** vol 1 (2008) PARA 161; **DAMAGES** vol 12(1) (Reissue) PARAS 1051-1052.

2 *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360, CA, considered by Mocatta J in *V/O Rasnoimport v Guthrie & Co Ltd* [1966] 1 Lloyd's Rep 1 at 12-13; *Hawke's Bay Milk Corp Ltd v Watson* [1974] 1 NZLR 236.

3 Holdsworth *History of English Law* (3rd Edn, 1923) vol 8 p 89.

4 *Lomax v Dankel* (1981) 29 SASR 68, SA SC; Winfield *Province of the Law of Tort* (1931) p 178.

5 See *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July.

6 *Collen v Wright* (1857) 8 E & B 647 at 657-658 per Willes J; *Dickson v Reuter's Telegram Co Ltd* (1877) 3 CPD 1 at 5, CA, per Bramwell LJ; *Yonge v Toynbee* [1910] 1 KB 215 at 228, CA, per Buckley LJ; *Allan and Anderson Ltd v AH Basse Rederi A/S, The Piraeus* [1974] 2 Lloyd's Rep 266, CA; *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237 at [60], [2006] 1 All ER 437 at [60], [2006] 1 WLR 2276 at [60] per Buxton LJ; *OBG Ltd v Allan* [2007] UKHL 21 at [93], [2008] 1 AC 1 at [93], [2007] 4 All ER 545 at [93] per Lord Hoffmann, and see Bowstead and Reynolds on Agency (18th Edn, 2006) para 9-062.

7 See PARA 521; and **NEGLIGENCE** vol 78 (2010) PARA 14. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 797.

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#### 409. Misrepresentation.

Claims against a person who makes a misrepresentation<sup>1</sup> may lie in tort for deceit<sup>2</sup> or for negligent misstatement<sup>3</sup>. A misrepresentation which induces the making of a contract may become a term of that contract and give rise to a claim for breach of contract<sup>4</sup>. Alternatively a misrepresentation may be the subject of a collateral contract<sup>5</sup>. The liability imposed by statute for certain non-fraudulent misrepresentations<sup>6</sup> has been characterised as a liability *sui generis*, sounding neither in contract nor in tort<sup>7</sup>, but affords an equivalent measure of damages to that recoverable in tort for deceit<sup>8</sup>.

1 As to misrepresentation see PARA 517 et seq; and **MISREPRESENTATION AND FRAUD**.

2 See PARA 519; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 755 et seq.

3 See PARA 521; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 762 et seq; **NEGLIGENCE** vol 78 (2010) PARA 14.

4 See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 817. See also **CONTRACT**.

5 As to collateral contracts see **CONTRACT** vol 9(1) (Reissue) PARA 753.

6 See the Misrepresentation Act 1967 s 2(1), (2); PARA 520; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801 et seq; but cf PARA 417 text and note 12 (damages based on contractual measure for innocent misrepresentation). See also **DAMAGES** vol 12(1) (Reissue) PARAS 1109-1110.

7 *Farley Health Products Ltd v Babylon Trading Co* (1987) Times, 29 July, obiter per Lawson J.

8 *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA. In *Smith New Court (Securities) Ltd v Citibank NA* [1997] AC 254 at 282-283, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 793, HL, Lord Steyn noted that there had been trenchant academic criticism of *Royscot* but declined to express a concluded view on its correctness. See also *Smith New Court (Securities) Ltd v Citibank NA* [1997] AC 254 at 267, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 779, HL, per Lord Browne-Wilkinson. See further **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 811; **DAMAGES** vol 12(1) (Reissue) PARA 1109.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(2) HYBRID OR AMBIGUOUS FORMS OF LIABILITY/410. Common carriers.

#### 410. Common carriers.

Common carriers<sup>1</sup> traditionally occupy one of the common callings<sup>2</sup>, and owe special obligations not arising under the general law of tort. Common carriers are bailees of goods entrusted to them<sup>3</sup> but their liability differs from that of ordinary bailees, such as private carriers<sup>4</sup>. Subject to various restrictions and defences<sup>5</sup>, the common carrier is strictly answerable at common law for loss or damage occurring to the consignor's goods<sup>6</sup> and owes an obligation not to refuse to carry goods of a kind which he holds himself out to carry, provided his operations extend to the proposed destination and the consignor is willing and able to pay a reasonable charge for carriage<sup>7</sup>. While it appears that the common carrier's liability in respect of goods, at least, does not depend on contract<sup>8</sup>, some authorities favour a contractual analysis<sup>9</sup>. Other authorities treat the common carrier's liability as one sounding in tort<sup>10</sup>. It appears preferable to conclude that the liability of the common carrier, similarly to that of the innkeeper at common law<sup>11</sup>, is founded on status and custom of the realm<sup>12</sup> rather than on contract, tort or bailment<sup>13</sup>.

1 As to common carriers see generally **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 3 et seq.

2 See also innkeepers, PARA 411.

3 Ie because they are voluntarily in possession of goods which belong to another: see **BAILMENT** vol 3(1) (2005 Reissue) PARA 1.

4 As to private carriers see generally **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 56 et seq.

5 See **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 7-37.

6 See **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 16.

7 See **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 7-8.

8 *London and North Western Rly Co v Richard Hudson & Sons Ltd* [1920] AC 324, HL; *Eastman Chemical International AG v NMT Trading Ltd and Eagle Transport Ltd* [1972] 2 Lloyd's Rep 25. See also **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 16.

9 See eg *Fleming v Manchester, Sheffield and Lincolnshire Rly Co* (1878) 4 QBD 81 at 83 per Bramwell LJ. See also Palmer *Bailment* (3rd Edn, 2009) para 27-029 note 212.

10 See eg *Pozzi v Shipton* (1838) 8 Ad & El 963 per Patteson J; *Marshall v York, Newcastle and Berwick Rly Co* (1851) 11 CB 655 at 663-664 per Williams J; but cf Palmer *Bailment* (3rd Edn, 2009) para 27-029 note 212.

11 *Readhead v Midland Rly Co* (1869) LR 4 QB 379 at 382, Ex Ch; *Clarke v West Ham Corp* [1909] 2 KB 858 at 879, CA. As to innkeepers see PARA 411; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 183 et seq.

12 *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1977] QB 49 at 67, [1976] 3 All ER 243 at 251, CA, per Lord Denning MR; and see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 3; **CUSTOM AND USAGE**.

13 It is an open question whether a claim against a common carrier for loss of or damage to goods counts as a claim in tort for the purposes of the Torts (Interference with Goods) Act 1977 s 1 (see PARA 603) and lies in conversion under the statutory form of that tort created by s 2(2) (see PARA 601).

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#### 411. Innkeepers.

The innkeeper<sup>1</sup> occupies one of the common callings<sup>2</sup>. Subject to various restrictions and defences<sup>3</sup>, he is strictly answerable at common law for loss or damage<sup>4</sup> occurring to the goods of guests when those goods are within the hospitium of the inn<sup>5</sup>, and owes an obligation to receive travellers who present themselves as willing to pay a reasonable charge for accommodation<sup>6</sup>. His liability for goods does not depend on bailment<sup>7</sup> (because the goods for which he is answerable may not be within his possession)<sup>8</sup> or on contract<sup>9</sup>. It is founded on status and custom of the realm and does not come under any other head of law<sup>10</sup>. The liability of innkeepers is now substantially modified by statute<sup>11</sup>.

1 See generally **LICENSING AND GAMBLING** vol 67 (2008) PARA 183 et seq.

2 See **LICENSING AND GAMBLING** vol 67 (2008) PARA 186; and also PARA 410 (common carriers).

3 See **LICENSING AND GAMBLING** vol 67 (2008) PARAS 187-194, 198-204.

4 *Day v Bather* (1863) 2 H & C 14. But some authorities hold that the strict common law liability does not extend to damage but only loss of the goods: *Winkworth v Raven* [1931] 1 KB 652; *Williams v Owen* [1956] 1 All ER 104, [1955] 1 WLR 1293.

5 See **LICENSING AND GAMBLING** vol 67 (2008) PARAS 197-198.

6 See **LICENSING AND GAMBLING** vol 67 (2008) PARA 186.

7 *Robins & Co v Gray* [1895] 2 QB 501 at 503-504, CA, per Lord Esher MR; and see **LICENSING AND GAMBLING** vol 67 (2008) PARA 197.

8 See generally **BAILMENT**.

9 See **LICENSING AND GAMBLING** vol 67 (2008) PARA 197. At common law, the innkeeper cannot contract out of the liability imposed on him by custom of the realm: *Williams v Linnitt* [1951] 1 KB 565 at 585, [1951] 1 All ER 278 at 290, CA, per Denning LJ. But see the Hotel Proprietors Act 1956 s 2(3).

10 *Robins & Co v Gray* [1895] 2 QB 501 at 503-504, CA, per Lord Esher MR; and see **LICENSING AND GAMBLING** vol 67 (2008) PARA 197.

11 See the Hotel Proprietors Act 1956; and **LICENSING AND GAMBLING** vol 67 (2008) PARA 186 et seq.

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### (3) THE CONJUNCTION OF DAMAGE AND INJURY

#### (i) Damnum absque Injuria

#### 412. Damage without infringement of legal right (damnum absque injuria).

The world is full of harm for which the law furnishes no remedy<sup>1</sup>. A person may sustain loss or damage and yet possess no remedy in tort, because his legal rights have not been infringed in any way which the law regards as unjustifiable, so that he has suffered no legal wrong<sup>2</sup>. This doctrine is embodied in the Latin phrase 'damnum absque injuria'<sup>3</sup>.

1 *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23 at [100], [2005] 2 AC 373 at [100], [2005] 2 All ER 443 at [100] per Lord Rodger of Earlsferry.

2 'You must have in our law injury as well as damage. The act of the defendant, if lawful, may still cause a great deal of damage to the plaintiff': *Day v Brownrigg* (1878) 10 ChD 294 at 304, CA, per Jessel MR. See also *Mayor of Bradford v Pickles* [1895] AC 587 at 601, HL, per Lord Macnaghten; *Clark v London General Omnibus Co Ltd* [1906] 2 KB 648 at 663, CA, per Sir Gorell Barnes P; *Hammerton v Earl of Dysart* [1916] 1 AC 57 at 84, HL, per Lord Parker of Waddington.

An important category of damnum absque injuria is pure economic loss caused by negligent act: see eg *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569, [1965] 3 All ER 560; *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, [1972] 3 All ER 557, CA; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL. Economic loss caused by negligent misrepresentation is recoverable where responsibility has been assumed: see *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; and **MISREPRESENTATION AND FRAUD**. Loss caused by perjury (*Hargreaves v Bretherton* [1959] 1 QB 45, [1958] 3 All ER 122) or by contempt of court is also damnum absque injuria (*Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513, CA).

3 See eg *Hay (or Bourhill) v Young* [1943] AC 92 at 106, [1942] 2 All ER 396 at 404, HL, per Lord Wright; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442, [1942] 1 All ER 142, HL, per Viscount Simon LC; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 699, [1997] 2 All ER 426 at 445, HL, per Lord Lloyd of Berwick. The phrase 'damnum sine injuria' is also found: see eg *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353 at [53] per Lord Rodger of Earlsferry.



Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(3) THE CONJUNCTION OF DAMAGE AND INJURY/(i) Damnum absque Injuria/413. User of land.

#### 413. User of land.

Subject to the planning legislation, an owner or occupier of land may use it for any purpose for which it might be used in the ordinary course of the enjoyment of land; and, even though in so doing he may inflict injury upon his neighbour, the neighbour has no actionable cause of complaint<sup>1</sup>. For example, without incurring liability, he may win the underlying minerals in the ordinary way, even if water is thereby allowed to percolate into an adjoining mine<sup>2</sup>; he may abstract underground water flowing in no defined channel, and so stop the flow of his neighbour's spring<sup>3</sup> or cause the surface of the neighbour's land to subside<sup>4</sup>; he may grow poisonous yew trees on his land<sup>5</sup> so long as they do not overhang the fences<sup>6</sup>, although animals which stray in may be poisoned, or although third persons may remove the clippings and deposit them elsewhere<sup>7</sup>; he may erect a high wall or disfiguring buildings, and thus deprive his neighbour's house of its outlook<sup>8</sup> or amenities<sup>9</sup>; he may cut off light<sup>10</sup> or air<sup>11</sup> from an adjoining house and even 'let it down'<sup>12</sup> by excavations on his own land, provided the neighbour has no legal right to light, air or support<sup>13</sup>; and he may interfere with his neighbour's privacy by opening a new window providing a view over next-door's garden<sup>14</sup>.

1 *Rylands v Fletcher* (1868) LR 3 HL 330 at 338 per Lord Cairns; *Wilson v Waddell* (1876) 2 App Cas 95 at 99, HL, per Lord Blackburn; *West Cumberland Iron and Steel Co v Kenyon* (1879) 11 ChD 782 at 786-787, CA, per James LJ; *Whalley v Lancashire and Yorkshire Rly Co* (1884) 13 QBD 131 at 135-136, CA, per Brett LJ; *Southwark London Borough Council v Tanner*; *Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1, [1999] 4 All ER 449, HL. As to planning legislation see **TOWN AND COUNTRY PLANNING**.

2 *Smith v Kenrick* (1849) 7 CB 515; *Baird v Williamson* (1863) 15 CBNS 376; *Wilson v Waddell* (1876) 2 App Cas 95, HL. See **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 271.

3 *Chasemore v Richards* (1859) 7 HL Cas 349; *Mayor of Bradford v Pickles* [1895] AC 587, HL. See **WATER AND WATERWAYS** vol 100 (2009) PARAS 97, 106.

4 *Popplewell v Hodgkinson* (1869) LR 4 Exch 248; *Stephens v Anglian Water Authority* [1987] 3 All ER 379, [1987] 1 WLR 1381, CA.

5 *Ponting v Noakes* [1894] 2 QB 281. See **FORESTRY** vol 52 (2009) PARA 59.

6 *Crowhurst v Amersham Burial Board* (1878) 4 ExD 5. See also *Smith v Giddy* [1904] 2 KB 448. A tenant who takes a lease of land overhung at the date of the lease by yew trees growing on land retained by his landlord has no right of action against the landlord if his cattle are poisoned: *Cheater v Cater* [1918] 1 KB 247, CA.

7 *Wilson v Newberry* (1871) LR 7 QB 31.

8 *Aldred's Case* (1610) 9 Co Rep 57b at 58b per Wray CJ. See also **EASEMENTS AND PROFITS A PRENDRE**. However, a claim will lie if the outlook or amenities are interfered with by an act that amounts to a public nuisance resulting in special damage to the person whose outlook or amenities are injured: *Campbell v Paddington Corpn* [1911] 1 KB 869, DC.

9 *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL (television reception).

10 *Levet v Gas Light and Coke Co* [1919] 1 Ch 24.

11 *Webb v Bird* (1863) 13 CBNS 841. See also *Chastey v Ackland* [1895] 2 Ch 389, CA (on appeal [1897] AC 155, HL); and **EASEMENTS AND PROFITS A PRENDRE**.

12 *Wyatt v Harrison* (1832) 3 B & Ad 871; *Partridge v Scott* (1838) 3 M & W 220; *Birmingham Corpn v Allen* (1877) 6 ChD 284, CA. Possibly in this case he must not dig negligently: see *Dodd v Holme* (1834) 1 Ad & El 493. See also *Southwark and Vauxhall Water Co v Wandsworth Board of Works* [1898] 2 Ch 603, CA. See **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 976.

13 As to rights or easements of light, air or support see **EASEMENTS AND PROFITS A PRENDRE**.

14 *Tapling v Jones* (1865) 11 HL Cas 290 at 305 per Lord Westbury LC. See also *Browne v Flower* [1911] 1 Ch 219.

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#### **414. Trade rivalry.**

Injury or loss occasioned to a person's trade, calling or profession by the interference of others is not actionable at common law, even though the interference is concerted<sup>1</sup>, if the means used to inflict the loss are not unlawful and the real purpose is not to injure another, but to forward or defend the trade or occupation of the person or persons who work the injury<sup>2</sup>. Thus the following are cases of damnum absque injuria: damage resulting from the setting up of a rival school to entice away the claimant's scholars<sup>3</sup>; persuading an employer not to renew the claimant's employment<sup>4</sup>; and the underselling of a rival trader to get a monopoly of a trade<sup>5</sup>. The prevention, restriction or distortion of competition or the abuse of a dominant position within the common market may, however, result in a liability in damages for breach of the EU Treaty<sup>6</sup>.

1 As to the tort of conspiracy see PARA 623 et seq.

2 *Sorrell v Smith* [1925] AC 700, HL; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, [1942] 1 All ER 142, HL.

3 *Gloucester Grammar School Case* (1410) YB 11 Hen 4, fo 47, pl 21. Cf *Sweeney v Coote* [1907] AC 221, HL.

4 *Allen v Flood* [1898] AC 1, HL.

5 *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25, HL; *Ajello v Worsley* [1898] 1 Ch 274; *Imperial Tobacco Co of India Ltd v Bonnan* [1924] AC 755, PC.

6 See the Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) arts 101, 102. The Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed by the Treaty of Lisbon Amending the Treaty Establishing the European Union and the Treaty Establishing the European Community (Lisbon, 13 December 2007; ECS 13 (2007); Cm 7294) and its provisions renumbered by virtue of the Treaty of Amsterdam and by the Treaty of Lisbon. See C-453/99 *Courage Ltd v Crehan* [2002] QB 507, [2001] ECR I-6297, ECJ. As to monopolies generally see **COMPETITION** vol 18 (2009) PARA 361 et seq.

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#### **415. Use of a name, likeness or identity.**

The annoyance or inconvenience resulting from the assumption of another's name<sup>1</sup>, likeness<sup>2</sup> or voice<sup>3</sup>, or the name of his residence<sup>4</sup>, is not actionable unless the use amounts to passing off<sup>5</sup>, infringement of a trade mark<sup>6</sup> or a breach of contract<sup>7</sup>, confidence<sup>8</sup> or copyright<sup>9</sup>, or is defamatory<sup>10</sup> or otherwise infringes his legal rights<sup>11</sup>.

- 1 *Du Boulay v Du Boulay* (1869) LR 2 PC 430 at 441-442 per Lord Chelmsford; *Dockrell v Dougall* (1899) 80 LT 556, CA (use of doctor's name in an advertisement). Cf *Earl Cowley v Countess Cowley* [1901] AC 450, HL, refusing injunction to prevent divorced woman's use of title she acquired as wife of her former husband but was no longer entitled to use.
- 2 *Corelli v Wall* (1906) 22 TLR 532 (postcards).
- 3 *Sim v HJ Heinz & Co Ltd* [1959] 1 All ER 547, [1959] 1 WLR 313, CA.
- 4 *Day v Brownrigg* (1878) 10 ChD 294, CA (private residence); *Street v Union Bank of Spain and England* (1885) 30 ChD 156 (telegraphic address).
- 5 See eg *Irvine v Talksport Ltd* [2003] EWCA Civ 423, [2003] 2 All ER 881, [2003] 1 WLR 1576, where it was held that the use of the claimant's image in the defendant's advertising indicated that he had endorsed its radio station. As to passing-off actions see PARA 610; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 416 et seq.
- 6 As to trade marks see **TRADE MARKS AND TRADE NAMES**.
- 7 See eg *Pollard v Photographic Co* (1888) 40 ChD 345 (image taken by commercial photographer); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 12. See also **CONTRACT**.
- 8 See eg *Pollard v Photographic Co* (1888) 40 ChD 345; and **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 401 et seq. See also PARA 611; and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 13.
- 9 As to infringement of copyright in general see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 311 et seq.
- 10 *Tolley v JS Fry & Sons Ltd* [1931] AC 333, HL (caricature of an amateur golfer used as an advertisement of goods held to be capable of amounting to a libel). See **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 11-12.
- 11 See eg the Copyright, Designs and Patents Act 1988 s 85 (amended by SI 1995/3297; and SI 2003/2498), which provides that, subject to various exceptions, a person who for private and domestic purposes commissions the taking of a photograph or the making of a film, where copyright subsists in the resulting work, has the right not to have (inter alia) copies of the work issued to the public, or the work exhibited or shown in public. See **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 476.

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## (ii) Damage and Causation

### 416. *Injuria sine damno*.

The cause of action in certain torts may be complete without proof of actual damage or loss<sup>1</sup>, and in such cases the infringement of right alone is the tort. Nominal damages are recoverable<sup>2</sup> or, in suitable instances, an injunction may be granted<sup>3</sup>; but, if damages for particular loss are sought, causal connection between the tort and the alleged loss must be shown<sup>4</sup>.

1 Eg trespass to the person, trespass to goods (eg by seizure or removal) and trespass to land (see PARA 524 et seq); libel and slanders actionable per se (see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 1 et seq). Cf *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353, ruling that damage remains an element of the tort of misfeasance in public office and that liability does not arise for invasion of a constitutional right per se.

2 *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA; and see **DAMAGES** vol 12(1) (Reissue) PARAS 813, 860 et seq, 870 et seq, 940, 941.

3 *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411; *Patel v WH Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA.

4 See **DAMAGES** vol 12(1) (Reissue) PARA 854 et seq. As to trespass to goods see PARA 602. As to causation see PARA 417.

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#### 417. Causation.

A claimant on whom the burden of proving damage lies discharges the burden if he shows that, on a balance of probabilities, the tortious conduct caused or materially contributed to the injury or damage<sup>1</sup>. Exceptionally, it is enough that the tortious conduct materially contributed to the risk of the injury or damage occurring, provided the risks are all of the same or similar types<sup>2</sup>. In such cases the defendant's liability is proportional to the risk for which he was responsible<sup>3</sup> (unless statute provides otherwise<sup>4</sup>). The exceptional liability for materially contributing to risk does not arise if the defendant merely adds a different and dissimilar risk to risks to which the claimant is already exposed<sup>5</sup>. Even if causation is established by these principles, liability will not arise in respect of harm that is too remote. In negligence and nuisance and under the rule in *Rylands v Fletcher*<sup>6</sup> only such damages are recoverable as are the reasonably foreseeable consequences of the tortious act<sup>7</sup>. In deceit<sup>8</sup>, cases of knowingly wrongful conversion<sup>9</sup>, and negligent statutory misrepresentation under the Misrepresentation Act 1967<sup>10</sup> the defendant is responsible for all direct consequences, and this may apply to all intentional torts<sup>11</sup>. Innocent misrepresentation attracts the contractual measure of damages<sup>12</sup>.

1 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; *Bailey v Ministry of Defence* [2008] EWCA Civ 883, [2009] 1 WLR 1052, (2008) 103 BMLR 134.

2 *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, HL; *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305.

3 *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, [2006] 3 All ER 785.

4 See the Compensation Act 2006 s 3 (mesothelioma); and **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 640.

5 *Wilsher v Essex Area Health Authority* [1988] AC 1074, [1988] 1 All ER 871, HL.

6 See *Rylands v Fletcher* (1868) LR 3 HL 330; PARA 594; and **NUISANCE** vol 78 (2010) PARA 148 et seq. As to negligence see generally **NEGLIGENCE**; and as to nuisance see generally **NUISANCE**.

7 See **DAMAGES** vol 12(1) (Reissue) PARA 851.

8 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119 CA; *East v Maurer* [1991] 2 All ER 733, [1991] 1 WLR 461, CA; *Smith Kline & French Laboratories v Long* [1988] 3 All ER 887, [1989] 1 WLR 1, CA; *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, HL. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789 et seq.

9 *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19 at [103]-[104], [2002] 2 AC 883 at [103]-[104], [2002] 3 All ER 209 at [103]-[104] per Lord Nicholls of Birkenhead, suggesting a different approach based on foreseeability where the defendant acts in good faith.

10 *Royce Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA. See PARA 520; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801.

11 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 279-280, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 789, HL, per Lord Steyn.

12 *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA, per curiam. As to the contractual measure of damages see **DAMAGES** vol 12(1) (Reissue) PARA 941 et seq.

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## **(4) SPECIFIC PARTIES IN ACTIONS IN TORT**

### **418. The Crown.**

In general, by virtue of the Crown Proceedings Act 1947<sup>1</sup>, the Crown is subject to liability in tort in respect of Her Majesty's government in the United Kingdom or the Scottish Administration<sup>2</sup> to the same extent as a private person of full age and capacity for:

- 1 (1) torts committed by Crown servants or agents<sup>3</sup>;
- 2 (2) any breach of the common law duties of an employer to his servants or agents<sup>4</sup>;
- 3 (3) any breach of the common law duties attaching to the ownership, occupation, possession or control of property<sup>5</sup>; and
- 4 (4) any failure to comply with a statutory duty binding both upon the Crown and upon persons other than the Crown and its officers<sup>6</sup>.

1 See the Crown Proceedings Act 1947 s 2(1); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 182. As to the limitations on proceedings against the Crown see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 382; **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 102 et seq. It remains the case at common law that the Crown can do no wrong: *Chagos Islanders v Attorney General* [2004] EWCA Civ 997, [2004] All ER (D) 85 (Aug).

2 See the Crown Proceedings Act 1947 s 40(2)(b) (amended by the Scotland Act 1998 s 125, Sch 8 para 7(3) (a)), considered in *Trawnik v Lennox* [1985] 2 All ER 368, [1985] 1 WLR 532, CA.

3 See the Crown Proceedings Act 1947 s 2(1)(a).

4 See the Crown Proceedings Act 1947 s 2(1)(b).

5 See the Crown Proceedings Act 1947 s 2(1)(c).

6 See the Crown Proceedings Act 1947 s 2(2); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 182-183.

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### **419. Public bodies and public officers.**

Unless the contrary is provided by legislation, a public body<sup>1</sup> which is not a servant or agent of the Crown has the same duties and is subject to the same liabilities as the general law would impose on a private person doing the same things<sup>2</sup>. Its liability may be personal (that is, for its own acts or omissions) or vicarious (that is, for torts committed by its servants and agents in the scope of their employment or authority)<sup>3</sup>. Whether for these purposes the holder of a public

office is a servant under a contract of employment with the body which appointed him depends on the precise nature of the relationship in the individual case<sup>4</sup>. Under the Human Rights Act 1998, it is unlawful for a 'public authority' to act in a way which is incompatible with a right guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>5</sup> which has been incorporated into domestic law by virtue of the same Act, and the authority may be liable to damages in proceedings brought by the victim of an unlawful act if such award is necessary to afford just satisfaction to the person in whose favour it is made<sup>6</sup>.

1 The meaning of 'public body' varies according to the context: see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 6.

2 *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93. See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 9.

3 See eg *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL, where the House of Lords gave separate consideration to claims based on a direct duty of care (personal liability) and claims based on duties of care owed by their servants and agents (vicarious liability). As to the vicarious liability of employers in general see PARA 680 et seq. As to public officers and public authorities see further PARAS 718-721.

4 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 197 et seq.

5 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

6 See the Human Rights Act 1998 s 6(1); and PARA 721.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/420. Foreign monarchs and states.

#### **420. Foreign monarchs and states.**

A monarch or other head of state enjoys state immunity in his public capacity and diplomatic privilege, the latter extending to members of his family forming part of his household and his private servants<sup>1</sup>. A claim will not generally lie against a foreign state unless it submits to the jurisdiction<sup>2</sup>. There is no exception for actions in respect of torture<sup>3</sup>. State immunity extends not only to the state itself but also to the government of that state and any department of that government<sup>4</sup>. It does not extend to an entity which is distinct from the executive organs of the government of the state and capable of suing or being sued unless the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a state would have been so immune<sup>5</sup>. The exercise of sovereign authority here refers to acts which are of their own character governmental acts: it is not enough that the entity acted on the directions of the state because such an act need not possess the character of a governmental act<sup>6</sup>. Statutory exceptions from the immunity include actions in respect of death, personal injury or damage to or loss of property caused by an act or omission in the United Kingdom, actions in respect of the state's commercial transactions and contracts which fall to be performed in the United Kingdom, and actions in respect of the state's ownership, possession, or use of immovable property in the United Kingdom, such as occupiers' liability<sup>7</sup>, but this liability does not extend to buildings used for the official purposes of a diplomatic mission<sup>8</sup>. The above-stated principles of state immunity do not apply to proceedings relating to anything done by or in relation to the armed forces of a state while present in the United Kingdom<sup>9</sup>. The question of immunity in such a case is addressed as a matter of common law and turns on a distinction between sovereign and non-sovereign activities<sup>10</sup>.

- 1 See the State Immunity Act 1978 ss 14, 20; the Diplomatic Privileges Act 1964 s 2, Sch 1 arts 1, 31; and **CIVIL PROCEDURE**.
- 2 See the State Immunity Act 1978 ss 1, 2; and **CIVIL PROCEDURE**. As to submission to the jurisdiction see **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARA 246.
- 3 *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, [2007] 1 All ER 113.
- 4 See the State Immunity Act 1978 s 14(1).
- 5 See the State Immunity Act 1978 s 14(1), (2).
- 6 See *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694, [1995] 1 WLR 1147, HL, where the defendant's seizure of the claimant's aircraft was an governmental act, and hence attracted the immunity, but its subsequent retention and use of the aircraft pursuant to national legislation were not governmental acts and fell outside the immunity.
- 7 See the State Immunity Act 1978 ss 2-10 (s 4 amended by the British Nationality Act 1981 s 52(6), Sch 7; the British Overseas Territories Act 2002 s 2(3); and by SI 1986/948).
- 8 See the State Immunity Act 1978 s 16(1)(b).
- 9 See the State Immunity Act 1978 s 16(2). This exception is capable of extending to acts done by the civilian component of a state's armed forces: *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573, HL (education).
- 10 See eg *Littrell v United States of America (No 2)* [1994] 4 All ER 203, [1995] 1 WLR 82, CA (no action for personal injuries in respect of treatment at a US military hospital); *Holland v Lampen-Wolfe* [2000] 3 All ER 833, [2000] 1 WLR 1573, HL (immunity for publication of libel). See also **ARMED FORCES**.

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## 421. Diplomats.

Heads of a mission, the members of their staff having diplomatic rank and the members of their households are immune from civil jurisdiction in respect of their torts, except in the case of an action relating to any professional or commercial activity exercised outside their official functions or an action relating to succession in which they are involved as executor, administrator, heir or legatee as a private person<sup>1</sup>. Members of the administrative and technical staff of a mission, and their households, and members of the mission's service staff, are similarly immune in respect of acts performed in the course of their duties<sup>2</sup>.

- 1 See the Diplomatic Privileges Act 1964 s 2, Sch 1 arts 1, 31, 37(1); and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 274, 279.
- 2 See the Diplomatic Privileges Act 1964 Sch 1 art 37(2), (3); and **INTERNATIONAL RELATIONS LAW** vol 61 (2010) PARAS 280-281. As to the immunities of international organisations and consular officials see **INTERNATIONAL RELATIONS LAW**.

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## 422. European Union.

The European Union is liable for damage caused by its institutions or its servants in the performance of their duties in accordance with the general principles common to the laws of the member states<sup>1</sup>. Jurisdiction is vested in the European Court of Justice<sup>2</sup>.

1 Treaty on the Functioning of the European Union (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 340. The Treaty was formerly known as the Treaty Establishing the European Community; it has been renamed and its provisions renumbered: see PARA 414 note 5.

2 Treaty on the Functioning of the European Union art 268.

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### **423. Local authorities.**

In principle, a local authority is subject to the same liabilities as a private person in the same circumstances<sup>1</sup>. It may be liable both for its own tortious acts or omissions (personal liability) and for torts committed by its servants and agents in the scope of their employment or authority (vicarious liability)<sup>2</sup>. A local authority may also be liable as a 'public authority' under the Human Rights Act 1998<sup>3</sup>. However, no claim will lie against a local authority for doing that which the legislature has directed to be done or where the legislature has expressly or impliedly authorised the infringement of private rights<sup>4</sup>. If the legislature authorises the authority to act in a particular sphere, but leaves it to the authority's discretion whether and, if so, how to act, it is presumed that the legislature intended the discretion to be exercised carefully so as to avoid the infringement of private rights, and the authority may be liable for unnecessary damage caused by its carelessness or the carelessness of its servants and agents in the scope of their employment or authority<sup>5</sup>.

1 *Foreman v Mayor of Canterbury* (1871) LR 6 QB 214. See further PARAS 718-721.

2 See eg *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL. As to local authorities generally see **LOCAL GOVERNMENT** vol 69 (2009) PARA 22 et seq.

3 See PARA 419.

4 *Metropolitan Asylum District Managers v Hill* (1881) 6 App Cas 193 at 208, HL, per Lord Blackburn, and at 213 per Lord Watson; *Edgington v Swindon Corp* [1939] 1 KB 86, [1938] 4 All ER 57; *Smeaton v Ilford Corp* [1954] Ch 450, [1954] 1 All ER 923. See also PARA 720.

5 *Metropolitan Asylum District Managers v Hill* (1881) 6 App Cas 193 at 213, HL, per Lord Watson; *Manchester Corp v Farnworth* [1930] AC 171, HL; *Tate & Lyle Industries Ltd v GLC* [1983] 2 AC 509, [1983] 1 All ER 1159, HL; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 728, [1995] 3 All ER 353 at 362, HL, per Lord Jauncey of Tullichettle.

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### **424. Highway authorities.**

A person who suffers injuries caused by the defective state of a highway may have a cause of action against the relevant highway authority in negligence<sup>1</sup>, in public nuisance<sup>2</sup>, or for breach of statutory duty<sup>3</sup>. The highway authority's duty to maintain the highway<sup>4</sup> is a duty to ensure it



is safe for the relevant traffic<sup>5</sup>. The duty is generally limited to a duty to repair and keep in repair<sup>6</sup>, and does not allow liability for the failure to erect traffic signs<sup>7</sup> or paint warning marks on the road at a dangerous point<sup>8</sup>, but it is now expressly provided that the highway authority has the duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice<sup>9</sup>. The highway authority's general statutory duties to promote road safety do not themselves give rise to private rights of action in the event of breach or generate a common law duty of care, and the same applies a fortiori to its associated statutory powers<sup>10</sup>. In an action against a highway authority in respect of damage resulting from its failure to maintain a highway maintainable at the public expense, it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic<sup>11</sup>. For the purposes of such a defence, however, it is not relevant to prove that the authority had arranged for a competent person to carry out or supervise the maintenance of that part of the highway unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried them out<sup>12</sup>.

1 See eg *Bird v Pearce* [1979] RTR 369, CA. See further PARA 720; and **NEGLIGENCE** vol 78 (2010) PARA 51 et seq. But the highway authority's common law liability is only for dangers it has introduced, or for dangers introduced by a third party that it has unreasonably failed to abate, and not for its mere failure to improve the highway's safety: *Stovin v Wise (Norfolk County Council, third party)* [1996] AC 923, [1996] 3 All ER 801, HL; *Gorringe v Calderdale Borough Council* [2004] UKHL 15, [2004] 2 All ER 326, [2004] 1 WLR 1057.

2 See eg *Skilton v Epsom and Ewell UDC* [1937] 1 KB 112, [1936] 2 All ER 50, CA; *Macfarlane v Gwalter* [1959] 2 QB 332, [1958] 1 All ER 181, CA. See further PARA 720; and **NUISANCE** vol 78 (2010) PARA 187.

3 See eg *Roe v Sheffield City Council* [2003] EWCA Civ 1, [2004] QB 653, [2003] LGR 389. See further PARAS 495 et seq, 720.

4 See the Highways Act 1980 s 41 (amended by the Railways and Transport Safety Act 2003 s 111).

5 *Littler v Liverpool Corp* [1968] 2 All ER 343n, CA; *Rider v Rider* [1973] QB 505, [1973] 1 All ER 294, CA; *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR P291, CA; *Jones v Rhondda Cynon Taff CBC* [2008] EWCA Civ 1497, [2009] RTR 151.

6 *Goodes v East Sussex County Council* [2000] 3 All ER 603, [2000] 1 WLR 1356, HL.

7 *Lavis v Kent County Council* [1992] PIQR P351, CA.

8 *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 2 All ER 326, [2004] 1 WLR 1057.

9 See the Highways Act 1980 s 41(1A) (added by the Railways and Transport Safety Act 2003 s 111), effectively reversing *Goodes v East Sussex County Council* [2000] 3 All ER 603, [2000] 1 WLR 1356, HL, on this precise issue.

10 *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 2 All ER 326, [2004] 1 WLR 1057. The House of Lords was considering the now-repealed Highways Act 1980 s 39, but its reasoning is of general application.

11 See the Highways Act 1980 s 58(1); PARA 510; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302. For the matters to which the court must have particular regard for the purposes of the defence see s 58(2); PARA 510; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302. See *Griffiths v Liverpool Corp* [1967] 1 QB 374, [1966] 2 All ER 1015, CA (considering the equivalent defence in earlier legislation); *Cross v Kirklees Metropolitan Borough Council* [1998] 1 All ER 564, CA; *Jones v Rhondda Cynon Taff CBC* [2008] EWCA Civ 1497, [2009] RTR 151.

12 See the Highways Act 1980 s 58(2); PARA 510; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302.

Under the Human Rights Act 1998, it is unlawful for public bodies, including highway authorities, to act in a way incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4

November 1950; TS 71 (1953); Cmd 8969): see PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/425. Postal authorities.

#### **425. Postal authorities.**

Special statutory rules limit the tort liability of a person designated a universal postal service provider<sup>1</sup> under the Postal Services Act 2000. A universal postal service provider may accept a limited liability for loss of or damage to registered inland packets so far as the loss or damage is due to any wrongful act or, or any neglect or default by, their officer, servant, employee, agent or sub-contractor while performing or purporting to perform in that capacity his functions in relation to the receipt, conveyance, delivery or other dealing with the packet<sup>2</sup>. Otherwise, neither a universal service provider nor any of its officers, servants, employees, agents or sub-contractors is liable in tort<sup>3</sup> for anything done or omitted to be done in relation to any postal packet in the course of transmission by post or for any omission to carry out arrangements for the collection of anything to be conveyed by post<sup>4</sup>. Such liability is also excluded in respect of any person engaged in or about the conveyance of postal packets, or such person's officer, servant, employee, agent or sub-contractor<sup>5</sup>.

1 Postal Services Act 2000 s 4(3); and see **POST OFFICE** vol 36(2) (Reissue) PARA 24.

2 See the Postal Services Act 2000 ss 91, 92; and **POST OFFICE** vol 36(2) (Reissue) PARA 96. For analysis of the extent of liability for this statutory tort see *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247, [1965] 1 All ER 163, CA (decided under earlier legislation).

3 'Tort' here includes liability in bailment: see *American Express Co v British Airways Board* [1983] 1 All ER 557, [1983] 1 WLR 701; and PARA 407.

4 See the Postal Services Act 2000 s 90(1), (2); and **POST OFFICE** vol 36(2) (Reissue) PARA 87. Thus the addressee of a letter on the envelope of which the Post Office stamped 'Remember that Road Accidents are Caused by People Like You' could not recover damages in libel: *Boakes v Postmaster-General* (1962) Times, 27 October, CA. It should be noted that a claimant cannot evade the bar by suing in contract because acceptance of a letter for transmission by post does not give rise to a contractual relationship: *Triefus & Co Ltd v Post Office* [1957] 2 QB 352, [1957] 2 All ER 387, CA (theft of packets by Post Office employee).

5 See the Postal Services Act 2000 s 90(3); and **POST OFFICE** vol 36(2) (Reissue) PARA 87.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/426. Corporations.

#### **426. Corporations.**

A corporation is liable vicariously when its employee commits a tort in the course of his employment<sup>1</sup>. A corporation is also liable for a tort authorised or committed by the directing mind of the corporation, for that will be a tort by the corporation itself<sup>2</sup>. A corporation is not exempted from liability on the grounds that its tortious conduct, or tortious conduct that it authorised, was ultra vires<sup>3</sup>. Where an employee of a corporation commits an act which is ultra vires and not in the course of his employment, the corporation is not liable<sup>4</sup>.

A corporation can sue for any tort in the same way as an individual, except that some torts such as assault and false imprisonment, by their nature, cannot be committed against a corporation<sup>5</sup>.

A corporation is not a 'person' entitled to sue for unlawful harassment for the purposes of the Protection from Harassment Act 1997<sup>6</sup>. It has yet to be resolved whether bodies corporate enjoy a right to privacy at common law or under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)<sup>7</sup>.

1 See **COMPANIES** vol 14 (2009) PARA 296; **CORPORATIONS** vol 9(2) (2006 Reissue) PARAS 1275-1279. As to vicarious liability of employers see PARA 680 et seq.

2 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, HL. The person who represents the corporation's directing mind need not have a concurrent personal liability: *Williams v Natural Life Health Foods* [1998] 2 All ER 577, [1998] 1 WLR 830, HL (director not assuming personal responsibility in respect of his statements on behalf of the company).

3 *Campbell v Paddington Corp'n* [1911] 1 KB 869, DC. The validity of an act done by a company may not be called into question on the ground of lack of capacity by reason of anything in the company's constitution: see the Companies Act 2006 s 39; and **COMPANIES** vol 14 (2009) PARA 265.

4 *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534.

5 See **COMPANIES** vol 14 (2009) PARA 300; **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1279.

6 *Daiichi Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty* [2003] EWHC 2337 (QB), [2004] 1 WLR 1503, [2005] 1 BCLC 27.

7 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); the Human Rights Act 1998; PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq. Cf *R v Broadcasting Standards Commission, ex p British Broadcasting Corp'n* [2001] QB 885, [2000] 3 All ER 989, CA, where the Court of Appeal accepted that a corporation had a right to privacy for the purposes of the Broadcasting Act 1996 ss 110, 111.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/427. Trade unions.

#### **427. Trade unions.**

A trade union is not a body corporate but it is capable of suing and being sued in its own name<sup>1</sup>. A trade union is liable in tort for its own acts and for acts done on its behalf<sup>2</sup> except that by statute it is given a limited immunity in respect of tortious acts in contemplation or furtherance of a trade dispute<sup>3</sup>. Further, a trade union may be liable for the tort of inducing breach or threatening to interfere with the performance of a contract only if the act was authorised or endorsed by specified persons<sup>4</sup> and has not been repudiated by the executive, president or general secretary as soon as reasonably practicable after coming to the knowledge of any of them<sup>5</sup>.

Various limitations apply to the amount of damages which may be awarded against a trade union in any proceedings in tort except in respect of personal injury as a result of negligence, nuisance or breach of duty, breach of duty in connection with the ownership, occupation, possession, control or use of property, or product liability under Part I of the Consumer Protection Act 1987<sup>6</sup>.

A trade union does not have sufficient legal personality to enable it to sue in defamation<sup>7</sup>.

1 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 10(1); and **EMPLOYMENT** vol 40 (2009) PARA 852. This provision does not apply to a 'special register body': see s 117(1), (2), (3)(a)(i) (s 117(1) amended by SI 2009/1941).

2 See the Trade Union and Labour Relations (Consolidation) Act 1992 ss 10, 12(1), (2), 117(3) (ss 10(3), 117(3) amended by SI 2009/1941); and **EMPLOYMENT** vol 40 (2009) PARAS 852, 854.

3 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 219 (amended by the Trade Union Reform and Employment Rights Act 1993 s 49(2), Sch 8 para 72); and **EMPLOYMENT** vol 41 (2009) PARA 1349. The immunity does not apply to picketing unless it amounts to lawful peaceful picketing: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 219(3), 220; and **EMPLOYMENT** vol 41 (2009) PARA 1329. An act is not protected if it is action to enforce trade union membership, or action taken because of dismissal for taking unofficial action, or secondary action which is not lawful picketing, or if it amounts to pressure to impose a union recognition requirement: see ss 222-225; and **EMPLOYMENT** vol 41 (2009) PARA 1331. On the requirement of a ballot before industrial action by a trade union see s 226 et seq.

4 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 20; and **EMPLOYMENT** vol 41 (2009) PARA 1352. As to interference with the performance of a contract see PARA 614 et seq.

5 See the Trade Union and Labour Relations (Consolidation) Act 1992 s 21 (as amended by the Trade Union Reform and Employment Rights Act 1993 s 49(1), Sch 7 para 17); and **EMPLOYMENT** vol 41 (2009) PARA 1353.

6 See the Consumer Protection Act 1987 Pt I (ss 1-9). See the Trade Union and Labour Relations (Consolidation) Act 1992 s 22; and **EMPLOYMENT** vol 41 (2009) PARA 1354.

7 *Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd* [1980] QB 585, [1980] 1 All ER 1097.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/428. Unincorporated associations.

## 428. Unincorporated associations.

Unincorporated associations, such as members' clubs, cannot generally<sup>1</sup> sue or be sued in the association's name; but a member or members having the same interest in a claim as other members may sue or be sued as representatives of the latter<sup>2</sup>. No special rules determine whether a cause of action in tort subsists against the members of an unincorporated association. Mere common membership of a club does not give rise to a duty of care<sup>3</sup> but neither does it give rise to an immunity available to one member in a claim brought by another, so, if according to ordinary principles there is vicarious liability for the tort of an employee of the association, or if someone has been ordered to commit an act constituting a tort, or if there is a breach of the duties of an employer to an employee, or breach of any other duty of care, a cause of action would be established<sup>4</sup>.

1 However, cf eg trade unions (see PARA 427; and **EMPLOYMENT** vol 40 (2009) PARA 852) and friendly societies (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2290 et seq).

2 CPR 19.6; and see **CLUBS** vol 13 (2009) PARA 279. See also *Mercantile Marine Service Association v Toms* [1916] 2 KB 243, CA (libel claimants lacking common interest); *Campbell v Thompson* [1953] 1 QB 445, [1953] 1 All ER 831 (common interest of defendants in personal injury case); *Winder v Ward* (1957) Times, 26 February, CA (members of hunt lacking common interest in trespass). Cf *Prudential Assurance Co v Newman Industries Ltd* [1981] Ch 229, [1979] 3 All ER 507 (representative action brought by minority shareholder in company). Damages can be awarded in respect of property in which the members have a common interest: *EMI Records Ltd v Riley* [1981] 2 All ER 838, [1981] 1 WLR 923.

3 *Robertson v Ridley* [1989] 2 All ER 474, [1989] 1 WLR 872, CA.

4 *Prole v Allen* [1950] 1 All ER 476; *Owen v Northampton Borough Council* (1992) 156 LGR 23, CA; *Grice v Stourport Tennis, Hockey and Squash Club* [1997] CLY 3859, CA. See also **CLUBS** vol 13 (2009) PARA 231. As to vicarious liability for the tort of an employee see PARA 680 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/429. Employer and employee.

#### **429. Employer and employee.**

Where an employer expressly authorises his employee to do a particular act which is in itself a tort, or which necessarily results in a tort, the employer is liable to a claim in tort at the suit of the person injured<sup>1</sup>. His liability is equally clear where he ratifies a tort committed by his employee without his authority<sup>2</sup>. An employer is also liable whenever his employee commits a tort in the course of his employment<sup>3</sup>. An employee who commits a tort is liable in damages to the person injured, and his liability is not affected by the existence of a contract of employment, or, where he commits a tort in the course of his employment, by the existence of the corresponding liability of his employer for the same tort<sup>4</sup>.

An employer has no right to recover damages against the wrongdoer in respect of the loss of services which he sustains when his employee is injured<sup>5</sup>.

1 See PARA 690. As to liability of employers generally see PARA 672 et seq.

2 See PARA 691.

3 See PARA 692 et seq.

4 See PARA 683.

5 See PARA 715. The former action for loss of services of a menial servant has been abolished: see the Administration of Justice Act 1982 s 2(c)(i).

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/430. Independent contractors.

#### **430. Independent contractors.**

If the person employed to do particular work is not an employee but is an independent contractor the employer is not as a rule liable for any tort committed by him in the course of his employment, and any person injured thereby must look to the independent contractor for compensation<sup>1</sup>.

1 See PARA 689. For the exceptional circumstances where an employer of an independent contractor is liable for the torts of the independent contractor see PARAS 689, 709-710.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/431. Principal and agent.

#### **431. Principal and agent.**

Where a principal gives his agent express authority to do a particular act which is tortious or which necessarily results in a tort the principal is liable to third persons for any damage caused

thereby<sup>1</sup>. Where the principal has not expressly authorised the tort, he may be liable for a tort committed by his agent while acting within the scope of his implied authority<sup>2</sup>. Where the tort by the agent falls entirely outside the scope of his authority the principal is not liable<sup>3</sup>.

1 See **AGENCY** vol 1 (2008) PARA 150. See also PARA 690.

2 See **AGENCY** vol 1 (2008) PARA 151. See also PARA 691.

3 See **AGENCY** vol 1 (2008) PARA 151. See also PARAS 692-695.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/432. Partners.

### 432. Partners.

A partnership and each of its partners are jointly and severally liable to any person not himself a partner for torts committed by any partner either while acting in the ordinary course of the business of the firm, or with the authority of his co-partners<sup>1</sup>.

1 See the Partnership Act 1890 ss 10, 12; and **PARTNERSHIP** vol 79 (2008) PARA 73. See also *Hamlyn v John Houston & Co* [1903] 1 KB 81, CA; *Mercantile Credit Co Ltd v Garrod* [1962] 3 All ER 1103; *Flynn v Robin Thompson & Partners* [2000] All ER (D) 329, CA; *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97; *JJ Coughlan Ltd v Ruparelia* [2003] EWCA Civ 1057, [2003] 37 LS Gaz R 34, [2004] PNL R 4. Each partner may also have a personal liability in tort which is distinct from this vicarious liability: *Meekins v Henson* [1964] 1 QB 472, [1962] 1 All ER 899.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/433. Husband and wife.

### 433. Husband and wife.

The liability in tort of a married woman to persons other than her husband is the same as that of other persons<sup>1</sup>. A husband is liable for the torts of his wife only where the liability arises according to those principles of the law of torts which make one person answerable in tort for the acts of another<sup>2</sup>.

Each of the parties to a marriage has the like right of action in tort against the other as if they were not married<sup>3</sup>. Where such an action is brought during the subsistence of the marriage the court may stay the proceedings if it appears either that no substantial benefit will accrue to either party from the continuation of the proceedings<sup>4</sup> or that the question or questions in issue could be more conveniently disposed of under provisions of the Married Women's Property Act 1882 relating to the determination of questions between husband and wife as to the title to or possession of property<sup>5</sup>.

1 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 1; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 204-206, 210.

2 See the Law Reform (Married Women and Tortfeasors) Act 1935 s 3; and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 204.

3 See the Law Reform (Husband and Wife) Act 1962 s 1(1); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 211.

4 See the Law Reform (Husband and Wife) Act 1962 s 1(2)(a); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 211.

5 See the Law Reform (Husband and Wife) Act 1962 s 1(2)(b); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 211. The provisions referred to are those of the Married Women's Property Act 1882 s 17: see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 224.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/434. Mentally disordered persons.

#### **434. Mentally disordered persons.**

Mentally disordered persons are liable to the same extent as persons generally, provided that they have that state of mind which is required for liability in the particular tort<sup>1</sup>. A defendant will not be excused merely because he would be entitled in criminal proceedings arising out of the same facts to a defence of insanity<sup>2</sup>. However, if the defendant's conduct is, because of his mental disorder, involuntary and purely automatic, he is not liable in tort<sup>3</sup>.

A person who, by reason of mental disorder<sup>4</sup> or otherwise, lacks capacity to conduct proceedings, must have a litigation friend to conduct proceedings on his behalf<sup>5</sup>.

No one can be liable for a person's compulsory admission to hospital or any other act purporting to be done in pursuance of the Mental Health Act 1983 unless the act was done in bad faith or without reasonable care<sup>6</sup>. No civil proceedings may be brought in respect of any such act without the leave of the High Court<sup>7</sup>.

1 *Morriss v Marsden* [1952] 1 All ER 925.

2 *Morriss v Marsden* [1952] 1 All ER 925 (assault and battery; defendant knowing the nature and quality of his acts but unaware that what he was doing was wrong).

3 *Morriss v Marsden* [1952] 1 All ER 925 at 927. In an action in negligence the standard of care may be varied to reflect the defendant's mental disability even if his conduct is not fully involuntary: *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263, [1998] RTR 390, CA (overruling *Roberts v Ramsbottom* [1980] 1 All ER 7, [1980] 1 WLR 823 on this point).

4 See the Mental Health Act 1983 s 1(2) (amended by the Mental Health Act 2007 s 1(1), (2)); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 402.

5 See CPR Pt 21; and **CIVIL PROCEDURE**. Lack of capacity is assessed under the Mental Capacity Act 2005.

6 See the Mental Health Act 1983 s 139(1) (amended by the Mental Capacity Act 2005 s 67(1), (2), Sch 6 para 29(1), (3), Sch 7); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 407.

7 See the Mental Health Act 1983 s 139(2); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 407.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/435. General liability of children for tort.

#### **435. General liability of children for tort.**

Minority as such is not a defence in the law of tort. If a child is of tender years it is a question of fact whether he had the capacity or particular state of mind required for the tort for which it is sought to make him liable<sup>1</sup>. A child of an age at which he is capable of distinguishing between

right and wrong is liable for the consequences of his own wrongful conduct<sup>2</sup> unless the action is directly founded upon a contract on which he cannot be sued<sup>3</sup>.

Accordingly, a child can be sued for the return of money which he has stolen or obtained by fraud<sup>4</sup>, for trespass<sup>5</sup>, for damage done by a dangerous animal kept by him<sup>6</sup>, for wrongful retention of the claimant's goods<sup>7</sup>, for defamation<sup>8</sup>, for fraudulently passing off spurious goods as being of the claimant's manufacture<sup>9</sup>, for representing his business as being connected with the claimant's business<sup>10</sup>, or for negligence<sup>11</sup>.

A child is in the same position as any other claimant suing in tort, except that he must sue by his litigation friend<sup>12</sup>.

1 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 26; Bac Abr, *Infancy and Age (A), (H)*. In Canada it has been held that a child aged five years is too young to be found guilty of negligence: *Walmsley v Humenick* [1954] 2 DLR 232.

2 *Watts v Creswell* (1714) 9 Vin Abr 415. See also **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 23, 26.

3 See PARA 436.

4 *Bristow v Eastman* (1794) 1 Esp 172; *Re Seager*, *Seeley v Briggs* (1889) 60 LT 665; *Cowern v Nield* [1912] 2 KB 419 at 423-424, DC.

5 Bac Abr, *Infancy and Age (H)*; *Burnard v Haggis* (1863) 14 CB NS 45 (trespass to goods). Cf *Gorely v Codd* [1966] 3 All ER 891, [1967] 1 WLR 19; *Wilson v Pringle* [1987] QB 237, [1986] 2 All ER 440 (both trespass to the person).

6 Cf *North v Wood* [1914] 1 KB 629 (action against father rejected because daughter was old enough to have sole responsibility for the animal).

7 *Mills v Graham* (1804) 1 Bos & PNR 140; *Ballet v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA (both detinue). See **BAILMENT** vol 3(1) (2005 Reissue) PARA 60. Actions in detinue are abolished, and defaulting bailees may now be sued in conversion: see the Torts (Interference with Goods) Act 1977 s 2; and PARAS 600, 601.

8 *Hoddsman v Grissel* (1608) Noy 129. As to defamation see **LIBEL AND SLANDER**.

9 *Chubbs v Griffiths* (1865) 35 Beav 127.

10 *Woolf v Woolf* [1899] 1 Ch 343.

11 *Gorely v Codd* [1966] 3 All ER 891, [1967] 1 WLR 19. Cf *Donaldson v McNiven* [1952] 2 All ER 691 (action against the father). On the standard of care owed by a minor see *Mullin v Richards* [1998] 1 All ER 920, [1998] 1 WLR 1305, CA.

12 See CPR Pt 21; and **CIVIL PROCEDURE**.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/436. Liability of children for tort founded on contract.

#### **436. Liability of children for tort founded on contract.**

A child is not liable for a tort which is founded on a contract on which he cannot be sued<sup>1</sup>, as in the case of the warranty of goods<sup>2</sup>, or for a fraudulent misrepresentation as to his age which induces a party to contract with him<sup>3</sup>. However, even where there is such a contract, the claim in tort may proceed provided it can be framed without reliance on the contract as the basis of the claim<sup>4</sup>.



1 *Jennings v Rundall* (1799) 8 Term Rep 335; *Cowern v Nield* [1912] 2 KB 419, DC; *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA. In considering the range of contracts on which children can be sued see the Minors' Contracts Act 1987; and **CHILDREN AND YOUNG PERSONS; CONTRACT**. As to torts founded on contract on which a child cannot be sued see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 27.

2 *Howlett v Haswell* (1814) 4 Camp 118 (horse).

3 *Cowern v Nield* [1912] 2 KB 419, DC; *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA. The child may, however, be under an equitable obligation to restore money or property obtained by fraud, or its proceeds, and, under the Minors' Contracts Act 1987 s 3(1), the court at its discretion may order a person party to any contract that is unenforceable because of his minority to transfer to the other party any property he acquired under the contract, or any property representing it: see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 23-24. Since this statutory power is discretionary a claimant may elect to claim against the minor in restitution, which is available as of right and expressly saved by s 3(2).

4 *Bristow v Eastman* (1794) 1 Esp 172; *Burnard v Haggis* (1863) 14 CB NS 45; *Ballett v Mingay* [1943] KB 281, [1943] 1 All ER 143, CA.

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#### **437. Liability of parents and other persons.**

A parent is not liable without more for a tort committed by his child<sup>1</sup>, but may be liable for his child's torts if vicarious liability can be established independently, if he has previously authorised or subsequently ratified the child's act<sup>2</sup>, or if he has failed to exercise proper supervision of the child<sup>3</sup>. Thus where a child causes an injury to others the parent or any other person in charge of the child<sup>4</sup> may be liable if the parent or other person has control of a dangerous thing which causes the injury<sup>5</sup> or is negligent, either in permitting the child to use a thing which is dangerous in itself or known to be dangerous or capable of causing danger to others<sup>6</sup> or in not exercising proper control and supervision of the child<sup>7</sup>.

Irrespective of any pre-existing relationship with the child, a person who leaves a source of danger which causes injury or damage through the child's reasonably foreseeable and preventable intervention is prima facie liable for the loss<sup>8</sup>.

A parent may be liable in tort to and be sued by his child<sup>9</sup>. The parent's right of reasonable punishment acts as a defence against liability in battery unless actual bodily harm is caused<sup>10</sup>. There is no equivalent right for teachers in the child's school<sup>11</sup>.

A parent owes a duty of care to his child whilst the child is under his responsibility, and may be liable for failing to guard against and prevent the child suffering injury<sup>12</sup>. However, there is an area of parental discretion in which the courts should not intrude<sup>13</sup>. A duty of care to the child may also be assumed by others who take responsibility for him<sup>14</sup>. Liability may also arise on the part of strangers who negligently expose the child to a danger, even where there would be no danger to an adult<sup>15</sup>.

Whether a child is guilty of contributory negligence is judged with reference to the child's age<sup>16</sup>.

1 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 28.

2 *Moon v Towers* (1860) 8 CBNS 611.

3 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 28.

4 Eg a school: *Carmarthenshire County Council v Lewis* [1955] AC 549, [1955] 1 All ER 565, HL. As to the liability of school authorities and teachers in relation to injuries caused by children under their care see

generally *Gow v Glasgow Education Authority* 1922 SC 260, Ct of Sess; *Langham v Wellingborough School* (1932) 101 LJB 513; *Rawsthorne v Ottley* [1937] 3 All ER 902 (boys tipped up coke lorry delivering to school); *Ricketts v Erith Borough Council* [1943] 2 All ER 629; *Clark v Monmouthshire County Council* (1954) 118 JP 244, 52 LGR 246, CA (children playing with knife). In respect of objects fired or thrown at other children see *Jackson v LCC and Chappell* (1912) 28 TLR 359, CA; *Rich v LCC* [1953] 2 All ER 376, [1953] 1 WLR 895, CA. The standard of a reasonably careful parent may not aptly be applied to a master in respect of horseplay in a large school: see *Beaumont v Surrey County Council* (1968) 66 LGR 580, 112 Sol Jo 704. See also **EDUCATION** vol 15(2) (2006 Reissue) PARA 873.

5 *North v Wood* [1914] 1 KB 629 (dog known by father to be savage; daughter of sufficient age to exercise control over dog; father not responsible for damage done by dog). As to liability for injuries caused by animals in the possession of persons under 16 see now the Animals Act 1971 ss 2, 6(3); and **ANIMALS** vol 2 (2008) PARAS 747-748.

6 *Dixon v Bell* (1816) 5 M & S 198 (loaded gun); *Brown v Fulton* (1881) 9 R 36, Ct of Sess (horse); *Bebbee v Sales* (1916) 32 TLR 413 (air gun); *Thomas v Bishop* [1976] CLY 1872 (guns). Ordinary toys are not a danger for which special precautions have to be taken: see *Chilvers v LCC* (1916) 32 TLR 363; *Wray v Essex County Council* [1936] 3 All ER 97, CA (oilcan spout injured boy).

7 *Williams v Eady* (1893) 10 TLR 41, CA (phosphorus available to youths); but see *Crouch v Essex County Council* (1966) 64 LGR 240 (warning may discharge the duty). Cf *Gorley v Codd* [1966] 3 All ER 891, [1967] 1 WLR 19; *Donaldson v McNiven* [1952] 2 All ER 691, CA (no failure of supervision), distinguished in *Newton v Edgerley* [1959] 3 All ER 337, [1959] 1 WLR 1031.

8 *Martin v Stanborough* (1924) 41 TLR 1, CA (removing chocks for wheel of car on hill); *Haynes v Harwood* [1935] 1 KB 146, CA (unattended horse bolted, perhaps after stone was thrown); *Shiffman v Grand Priory in the British Realm of the Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557, sub nom *Shiftman v Order of the Hospital of St John* 80 Sol Jo 346 (releasing guy ropes of flagpole); *Wells v Metropolitan Water Board* [1937] 4 All ER 639, 54 TLR 104 (tampering with valve box). Cf *Prince v Gregory* [1959] 1 All ER 133, [1959] 1 WLR 177, CA (lime mortar left in street; no liability).

9 *Roberts v Roberts* (1657) Hard 96 (injunction against felling timber); *Ash v Lady Ash* (1696) Comb 357 (trespass to the person); *Young v Rankin* 1934 SC 499, Ct of Sess (car accident). As to limitation see **LIMITATION PERIODS** vol 68 (2008) PARA 952 et seq.

10 Children Act 2004 s 58(3), (4); and see *Murray v Moutrie* (1834) 4 Car & P 471 at 473 per Tindal CJ.

11 See the Education Act 1996 s 548; PARA 536; and **EDUCATION** vol 15(1) (2006 Reissue) PARA 577.

12 *S v Walsall Metropolitan Borough Council* [1985] 3 All ER 294, [1985] 1 WLR 1150, CA; *Barrett v Enfield London Borough Council* [2001] 2 AC 550, [1999] 3 All ER 193, HL (local authority undertaking child's upbringing; arguable duty of care). Cf *Eastham v Eastham* [1982] CLY 2141; *Surtees v Kingston-upon-Thames Borough Council* [1991] 2 FLR 559, CA (no parental liability on the facts).

13 *Barrett v Enfield London Borough Council* [1998] QB 367 at 377, [1997] 3 All ER 171 at 178, CA, per Lord Woolf MR; [2001] 2 AC 550 at 587, [1999] 3 All ER 193 at 226, HL, per Lord Hutton. See also *Porter v Barking and Dagenham London Borough Council* (1990) Times, 9 April (care should not stifle independence).

14 For the liability of school authorities and teachers for injuries suffered in the course of organised activities see *Gibbs v Barking Corp* [1936] 1 All ER 115, CA (vaulting in gym); *Fryer v Salford Corp* [1937] 1 All ER 617 (cooker); *Gillmore v LCC* [1938] 4 All ER 331 (polished floor of gym); *Ralph v LCC* (1947) 63 TLR 546 (game of touch); *Wright v Cheshire County Council* [1952] 2 All ER 789, CA (vaulting in gym); *Butt v Inner London Education Authority* (1968) 66 LGR 379 (machinery); *Affutu-Nartey v Clark* (1984) Times, 9 February (master tackling boy in game of rugby). Cf *Smoldon v Whitworth and Nolan* [1997] PIQR P133, CA (rugby referee). A school need not insure pupils against injuries whilst playing sport: see *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389, [1990] 1 WLR 235, CA.

For the liability of school authorities and teachers for injuries from the state of the premises see *Ching v Surrey County Council* [1910] 1 KB 736 (playground); *Morris v Caernarvon County Council* [1910] 1 KB 840, CA (door); *Woodward v Hastings Corp* [1945] KB 174, [1944] 2 All ER 565, CA (uncleared snow); *Reffell v Surrey County Council* [1964] 1 All ER 743, [1964] 1 WLR 358 (glass door); *Ward v Hertfordshire County Council* [1970] 1 All ER 535, [1970] 1 WLR 356, CA (playground).

The school should ensure the reasonable safety of premises to which it takes pupils on school trips (*Brown v Nelson* (1971) 69 LGR 20: no liability on the facts) and of the transport it provides to and from the school (*Shrimpton v Hertfordshire County Council* (1911) 104 LT 145, HL). The extent of the school's duty of supervision, if any, while the pupils are off the premises depends on the facts: see *Camkin v Bishop* [1941] 2 All ER 713, CA. On the school's duty to prevent the bullying of its pupils see *Bradford-Smith v West Sussex County Council* [2002] EWCA Civ 7, [2002] LGR 489, [2002] 1 FCR 425 (no liability on the facts).

The duty of care may also be owed to a child by a hospital: see *Gravestock v Lewisham Group Hospital Management Committee* (1955) Times, 27 May (hospital).

15 See eg *Yachuk v Oliver Blais Co Ltd* [1949] AC 386, [1949] 2 All ER 150, PC (nine-year-old sold petrol; burn injuries).

16 *Gough v Thorne* [1966] 3 All ER 398, [1966] 1 WLR 1387, CA. Contributory negligence has been found against very young children: see eg *McKinnell v White* 1971 SLT 61 (five-year-old); *Donovan v Landy's Ltd* [1963] IR 441 (six-year-old); *Morales v Eccleston* [1991] RTR 151, CA (75% contributory negligence by 11-year-old). Cases where there has been held not to be contributory negligence by children include: *Gough v Thorne* [1966] 3 All ER 398, [1966] 1 WLR 1387, CA (13-year-old); *Lynch v Nurdin* (1841) 1 QB 29 (seven-year-old); *Gardner v Grace* (1858) 1 F & F 359 (three-year-old); *Lay v Midland Rly Co* (1875) 34 LT 30 (four-year-old); *Harrold v Watney* [1898] 2 QB 320, CA (four-year-old). See also *Culkin v McFie & Sons Ltd* [1939] 3 All ER 613 (seven-year-old); *Jones v Lawrence* [1969] 3 All ER 267 (seven-year-old). See also *Minter v D & H Contractors (Cambridge) Ltd* (1983) Times, 30 June.

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#### **438. Liability of those with a statutory duty relating to the care and welfare of children.**

There is a substantial body of statute law making provision for the care and welfare of children<sup>1</sup>, and imposing duties on local authorities and others in respect of these objectives, but these duties do not generally give rise to private rights entitling an aggrieved child to sue in the tort of breach of statutory duty<sup>2</sup>. There may, however, be a common law duty of care, and hence a potential liability in negligence, where a child is taken into protective care<sup>3</sup>, though the duty is owed only to the child, and (arguably) other children at risk from the child whilst in care<sup>4</sup>, and not to the parents from whom the child is taken, because of the potential conflict of interests<sup>5</sup>. Whether a duty of care is owed to vulnerable children who are not in protective care is currently uncertain<sup>6</sup>. In other contexts in which statutory provision is made for the care and welfare of children, there may be an assumption of a duty of care towards a child, by or on behalf of the authority subject to the statutory duty, in accordance with general principles of the law of negligence<sup>7</sup>. Liability in the circumstances considered in this paragraph may also arise in an appropriate case under the Human Rights Act 1998<sup>8</sup>.

1 See eg the Children and Young Persons Act 2008; and **CHILDREN AND YOUNG PERSONS**.

2 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL. Whether such rights arise, however, is a question of statutory construction and each case therefore turns on the provisions of the relevant statute: *X v Bedfordshire County Council* [1995] 2 AC 633 at 731, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson.

3 *Barrett v Enfield London Borough Council* [2001] 2 AC 550, [1999] 3 All ER 193, HL; *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, [2003] 4 All ER 796, CA; upheld without deciding this point in *D v East Berkshire Community NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, [2005] 2 All ER 443.

4 *W v Essex County Council* [2001] 2 AC 592, [2000] 2 All ER 237, HL.

5 *D v East Berkshire Community NHS Trust* [2005] UKHL 23, [2005] 2 AC 373, [2005] 2 All ER 443.

6 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL, held there was no duty of care, but the policy considerations which led to that conclusion were said in *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, [2003] 4 All ER 796, to have shifted, warranting a finding that there was a duty of care to a child taken into care. It is not clear where this leaves the case - also considered in *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353, HL - of the child not taken into care.

7 *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, [2000] 4 All ER 504, HL (assumption of responsibility to child with special educational needs).

8 See PARA 721.

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#### **439. Persons liable to a child born disabled.**

A child who is born alive<sup>1</sup> but disabled<sup>2</sup> has in certain circumstances a cause of action for damages in respect of his disabilities as if they were personal injuries suffered by him immediately after birth<sup>3</sup>. The right of action may arise if the child is born disabled as a result of an occurrence which affected either parent of the child in his or her ability to have a normal, healthy child<sup>4</sup>, or which affected the mother during her pregnancy, or affected her or the child in the course of its birth, so that the child is born with disabilities which would not otherwise have been present<sup>5</sup>. No damages are recoverable in an action brought by a child alleging negligence on the part of doctors in failing to advise his or her parents that it would be advisable to terminate the pregnancy by reason of the fact that the child would be born with disabilities<sup>6</sup>. A person is not answerable to the child unless he was liable in tort to the parent or would, if sued in due time, have been so; and it is no answer that there could not have been such liability because the parent suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability<sup>7</sup>.

The mother of the child is liable if, and only if, she fails to take care for the safety of her unborn child while driving a motor vehicle<sup>8</sup> when she knows (or ought reasonably to know) herself to be pregnant, in which event she is to be regarded as being under the same duty to take care for the safety of the unborn child as the law imposes on her with respect to the safety of other people, and in consequence of her breach of that duty of care her child is born with disabilities<sup>9</sup>.

A person is not liable for anything he did or omitted to do when responsible in a professional capacity for treating or advising the parent, if he took reasonable care having due regard to then received professional opinion applicable to the particular class of case; but this does not mean that he is answerable only because he departed from received opinion<sup>10</sup>.

If in the child's action it is shown that the parent affected shared the responsibility for the child being born disabled, the damages are to be reduced to such an extent as the court thinks just and equitable having regard to the extent of the parent's responsibility<sup>11</sup>. In the case of an occurrence preceding the time of conception, the defendant is not answerable to the child if at that time either or both of the parents knew the risk of their child being born disabled (that is to say, the particular risk created by the occurrence); but should it be the child's father who is the defendant, this defence does not apply if he knew of the risk and the mother did not<sup>12</sup>. Any contract made with the parent affected which would exclude or restrict liability to the parent is equally effective in respect of liability to the child<sup>13</sup>.

In any case where:

- 5 (1) a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled<sup>14</sup>;
- 6 (2) the disability results from an act or omission in the course of the selection, or the keeping or use outside the body, of the embryo carried by her or of the gametes used to bring about the creation of the embryo<sup>15</sup>; and
- 7 (3) a person is answerable to the child in respect of the act or omission<sup>16</sup>,

the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child<sup>17</sup>. Subject to certain qualifications<sup>18</sup>, a person is answerable to the child if he was liable in tort to one or both of the parents or would, if sued in due time, have been so<sup>19</sup>. It is no answer that there could not have been such liability because the parent or parents concerned suffered no actionable injury, if there was a breach of legal duty which, accompanied by injury, would have given rise to the liability<sup>20</sup>. A person is not answerable to the child if, at the time the embryo, or the sperm and eggs, are placed in the woman or the time of her insemination, either or both of the parents knew the risk of their child being born disabled (that is, the particular risk created by the act or omission)<sup>21</sup>.

Where, for the purpose of instituting proceedings in relation to a child born disabled as a result of an actionable occurrence before its birth<sup>22</sup>, it is necessary to identify a person who would or might be the parent of a child but for the statutory provisions for determining the parentage of children born as a result of artificial insemination or assisted reproduction<sup>23</sup>, the court may, on the application of the child, make an order requiring the Human Fertilisation and Embryology Authority to disclose any information contained in the register kept by it identifying that person<sup>24</sup>.

1 'Born' means born alive (the moment of a child's birth being when it first has a life separate from its mother) and 'birth' has a corresponding meaning: Congenital Disabilities (Civil Liability) Act 1976 s 4(2)(a).

2 For these purposes, references to a child being born disabled or with disabilities are to its being born with any deformity, disease or abnormality, including predisposition (whether or not susceptible of immediate prognosis) to physical or mental defect in the future: Congenital Disabilities (Civil Liability) Act 1976 s 4(1).

3 Congenital Disabilities (Civil Liability) Act 1976 ss 1(1), 4(3) (s 4(3) amended by the Human Fertilisation and Embryology Act 1990 s 44(2)(b)). The provisions of the Nuclear Installations Act 1965 as to liability for, and compensation in respect of, injury or damage caused by occurrences involving nuclear matter or the emission of ionising radiations (see **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1495 et seq) extend also to pre-natal injury: see the Congenital Disabilities (Civil Liability) Act 1976 ss 3, 4(6).

The Congenital Disabilities (Civil Liability) Act 1976 applies in respect of all births after 22 July 1976 (ie the date of its passing): see s 4(5). It replaced in respect of any such birth any law in force before that date by which a person could be liable to a child in respect of disabilities with which it might be born: see s 4(5). See further *Burton v Islington Health Authority* [1993] QB 204, [1992] 3 All ER 833, CA, recognising a common law cause of action for congenital disabilities in respect of births before the passing of the 1976 Act.

The Act provides that no damages for loss of expectation of life are recoverable unless the child lives at least 48 hours: see the Congenital Disabilities (Civil Liability) Act 1976 s 4(4) (amended by the Human Fertilisation and Embryology Act 1990 s 44(2)). However, the right to damages for loss of expectation of life has been abolished in relation to an injured person who died on or after 1 January 1983: see the Administration of Justice Act 1982 ss 1(1)(a), 73(3), (4), 76 (11). As to the survival of the right in relation to causes of action arising before that date see s 73(1). See also **DAMAGES** vol 12(1) (Reissue) PARA 882.

4 Congenital Disabilities (Civil Liability) Act 1976 s 1(2)(a). In the case of an occurrence preceding the time of conception, there may be no liability if either or both of the parents knew the risk of their child being born disabled: see the text and note 12. In any case where a child carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination is born disabled, any reference in s 1 to a parent includes a reference to a person who would be a parent but for the Human Fertilisation and Embryology Act 1990 ss 27-29 or the Human Fertilisation and Embryology Act 2008 ss 33-47 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 102-105): see the Congenital Disabilities (Civil Liability) Act 1976 s 4(4A) (added by the Human Fertilisation and Embryology Act 1990 s 35(4); and amended by the Human Fertilisation and Embryology Act 2008 s 56, Sch 6 Pt 1 para 15).

5 Congenital Disabilities (Civil Liability) Act 1976 s 1(2)(b).

6 *McKay v Essex Area Health Authority* [1982] QB 1166, [1982] 2 All ER 771, CA.

7 Congenital Disabilities (Civil Liability) Act 1976 s 1(3).

8 'Motor vehicle' means a mechanically propelled vehicle intended or adapted for use on roads: Congenital Disabilities (Civil Liability) Act 1976 s 4(2)(b).

9 See the Congenital Disabilities (Civil Liability) Act 1976 ss 1(1), 2.

- 10 Congenital Disabilities (Civil Liability) Act 1976 s 1(5).
- 11 Congenital Disabilities (Civil Liability) Act 1976 s 1(7).
- 12 Congenital Disabilities (Civil Liability) Act 1976 s 1(4). The reference to the child's father here includes, in the case of a child who has a parent by virtue of the Human Fertilisation and Embryology Act 2008 s 42 or s 43 (dealing respectively with female civil partners and agreed female parenthood conditions), a reference to the woman who is a parent by virtue of that section: Congenital Disabilities (Civil Liability) Act 1976 s 1(4A) (added by the Human Fertilisation and Embryology Act 2008 Sch 6 Pt 1 para 14).
- 13 See the Congenital Disabilities (Civil Liability) Act 1976 s 1(6). The effect of s 1(6) is greatly limited by the Unfair Contract Terms Act 1977 s 2(1): see **CONTRACT** vol 9(1) (Reissue) PARA 819 et seq; **NEGLIGENCE** vol 78 (2010) PARA 74.
- 14 Congenital Disabilities (Civil Liability) Act 1976 s 1A(1)(a) (s 1A added by the Human Fertilisation and Embryology Act 1990 s 44). References to embryos are to be construed in accordance with the Human Fertilisation and Embryology Act 1990 s 1(1) and any regulations under s 1(6) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 102; **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 278); Congenital Disabilities (Civil Liability) Act 1976 s 4(2) (amended by the Human Fertilisation and Embryology Act 1990 s 44(2)(a); and the Human Fertilisation and Embryology Act 2008 s 65, Sch 7 para 1).
- 15 Congenital Disabilities (Civil Liability) Act 1976 s 1A(1)(b) (as added: see note 14).
- 16 Congenital Disabilities (Civil Liability) Act 1976 s 1A(1)(c) (as added: see note 14).
- 17 Congenital Disabilities (Civil Liability) Act 1976 s 1A(1) (as added: see note 14).
- 18 See the Congenital Disabilities (Civil Liability) Act 1976 ss 1(5)-(7), 1A(2)-(4) (as added: see note 14). See further the text and note 21.
- 19 Congenital Disabilities (Civil Liability) Act 1976 s 1A(2) (as added: see note 14).
- 20 Congenital Disabilities (Civil Liability) Act 1976 s 1A(2) (as added: see note 14).
- 21 Congenital Disabilities (Civil Liability) Act 1976 s 1A(3) (as added: see note 14). Section 1(5)-(7) (see the text and notes 10-13) applies for the purposes of s 1A: see s 1A(4) (as so added).
- 22 *Ie* under the Congenital Disabilities (Civil Liability) Act 1976 s 1.
- 23 *Ie* the Human Fertilisation and Embryology Act 1990 ss 27-29 and the Human Fertilisation and Embryology Act 2008 ss 33-47 (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 102-105); see the Human Fertilisation and Embryology Act 1990 s 35(1), (2A) (s 35(1) amended and s 35(2A) added by the Human Fertilisation and Embryology Act 2008 Sch 6 Pt 1 para 35).
- 24 See the Human Fertilisation and Embryology Act 1990 s 35(1); and **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 111. The provisions of s 34(2)-(4) (see **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 111) apply for these purposes: see s 35(3).

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#### **440. Personal representatives.**

On the death of any person all causes of action, other than defamation, subsisting against or vested in him survive against, or for the benefit of, the estate<sup>1</sup>. However, the right of a person to claim damages for bereavement does not survive for the benefit of his estate on death<sup>2</sup>. Where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable do not include any exemplary damages or any damages for loss of income in respect of any period after the person's death<sup>3</sup>.

These claims are brought or defended by the personal representatives of the deceased<sup>4</sup>. The ordinary rules for the limitation of actions govern these proceedings<sup>5</sup>.

1 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (amended by the Law Reform (Miscellaneous Provisions) Act 1970 s 7(2), Schedule; and the Administration of Justice Act 1982 s 75(1), Sch 9 Pt I). See also **EXECUTORS AND ADMINISTRATORS**. As to the abatement of proceedings by or against the deceased in respect of defamation see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 227.

2 Law Reform (Miscellaneous Provisions) Act 1934 s 1(1A) (added by the Administration of Justice Act 1982 s 4(1)). As to claims for damages for bereavement see the Fatal Accidents Act 1976 s 1A; PARA 488; and **NEGLIGENCE** vol 78 (2010) PARA 25 et seq.

3 Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a) (substituted by the Administration of Justice Act 1982 s 4(2)).

4 See **EXECUTORS AND ADMINISTRATORS**.

5 See generally **LIMITATION PERIODS**.

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#### 441. Bankrupts.

A liability in tort may be provable as a bankruptcy debt<sup>1</sup>. This applies to both corporate insolvency and individual bankruptcy. Torts committed after the bankruptcy are not bankruptcy debts and it appears that the bankrupt remains liable. If a bankrupt tortfeasor is covered by liability insurance, the rights of the bankrupt against the insurer are transferred to the injured person<sup>2</sup>. The bankrupt may protect after-acquired property against wrongdoers until the trustee intervenes<sup>3</sup>. Similar provision is made for insolvent companies<sup>4</sup> but they should be sued before dissolution or, if they have already been dissolved, restored to the register of companies in order to secure the benefits of rights against insurers<sup>5</sup>.

Where the claimant has a right of action in tort against the estate of a deceased person, and that estate is insolvent, he may prove in the administration of the estate for unliquidated damages<sup>6</sup>.

Where the cause of action arises from purely personal damage to the bankrupt then the right of action remains with the bankrupt<sup>7</sup>. Where two separate and distinct causes of action arise from the same conduct of the defendant, resulting both in substantial damage to the bankrupt's property and in injury to the bankrupt personally, the trustee is entitled to the right of action for damage to the property, and the bankrupt retains his right to sue for the personal injury<sup>8</sup>.

1 See the Insolvency Act 1986 s 382; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491. A bankruptcy debt includes any debt or liability (including any liability in tort) to which the bankrupt is subject at the commencement of the bankruptcy or to which he may later become subject (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy: see s 382(1), (4); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 479. As to 'liability' see *Firma C-Trade SA v Newcastle Protection and Indemnity Association* [1991] 2 AC 1, [1990] 2 All ER 705, HL. In determining whether any liability in tort is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued: see the Insolvency Act 1986 s 382(2); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 491.

2 See the Third Parties (Rights Against Insurers) Act 1930 s 1; and **INSURANCE** vol 25 (2003 Reissue) PARA 679 et seq.

3 *Re Pascoe* [1944] Ch 219, [1944] 1 All ER 281, CA.

4 See the Insolvency Rules 1986, SI 1986/1925; and **COMPANY AND PARTNERSHIP INSOLVENCY**.

5 See *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL; and the Companies Act 2006 s 1029 et seq. A company may be restored to the register of companies at any time for the purpose of bringing proceedings against it for damages for personal injury (including damages on death) but in any other case an application to the court for restoration of a company to the register may not be made after the end of the period of six years from the date of the dissolution of the company, unless an application for administrative restoration to the register has been made in time: see the Companies Act 2006 s 1030(1), (4)-(6).

6 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(6). As to the administration of estates see **EXECUTORS AND ADMINISTRATORS**.

7 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 435, 438.

8 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 436, which also considers the position where only one cause of action arises but there is damage both to property and to the person.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/442. Assignees.

#### 442. Assignees.

A right to sue in tort is not in general assignable<sup>1</sup>. A claimant may transfer to another the damages to be recovered in his claim in tort, as distinct from the cause of action itself<sup>2</sup>. Those rights of action in tort which pass to a trustee in bankruptcy<sup>3</sup> are assignable by the trustee to a third person, or even to the bankrupt<sup>4</sup>. Where a claimant's insurers have paid a claim made by him in respect of circumstances which afford him a cause of action in tort against another they are subrogated to the claimant's rights in respect of that tort<sup>5</sup>.

1 *Defries v Milne* [1913] 1 Ch 98, CA.

2 *Glegg v Bromley* [1912] 3 KB 474, CA. An assignment of property may be valid even though the property cannot be recovered without litigation: *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260, CA. Cf *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL (breach of contract), accepting that an assignee could support the assignment of a claim by showing a genuine commercial interest in its enforcement even in the absence of a property right.

3 See PARA 441; and see *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL (when one party to mutual claims became bankrupt, only the balance could be claimed).

4 *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA (where an action based on a negligent statement was validly assigned to the bankrupt, even though it was a term of the assignment that the bankrupt could retain only 65% of the net proceeds of the action); *Weddell v JA Pearce & Major* [1988] Ch 26, [1987] 3 All ER 624.

5 *King v Victoria Insurance Co Ltd* [1896] AC 250, PC; *Compania Columbiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216. See also **CHOSES IN ACTION** vol 13 (2009) PARA 99.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/443. Trespassers.

#### 443. Trespassers.



The fact that the claimant is a trespasser is not a bar to a claim that would otherwise arise<sup>1</sup>. However, by virtue of the occupiers' liability legislation, an occupier owes a restricted duty of care in respect of personal injuries to trespassers<sup>2</sup>. The occupier must be aware of the danger or have reasonable grounds to believe it exists<sup>3</sup>, know or have reasonable grounds to believe the trespasser is in the vicinity of the danger concerned or that he may come into the vicinity of the danger<sup>4</sup>; and the risk must be one against which, in all the circumstances of the case, the occupier might reasonably be expected to offer some protection<sup>5</sup>. The duty is to take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer injury on the premises by reason of the danger concerned<sup>6</sup>. A warning may suffice<sup>7</sup>. Acceptance of the risk will exclude liability<sup>8</sup> but the statute does not refer to the exclusion of liability by notice or agreement<sup>9</sup>. It appears that a non-occupying independent contractor would owe at least a duty of common humanity to a trespasser<sup>10</sup>, and such a duty might also be owed to other living creatures<sup>11</sup>.

1 *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL; *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA.

2 See the Occupiers' Liability Act 1984 s 1(3), (4); and **NEGLIGENCE** vol 78 (2010) PARA 40. The Act, in addition to applying to trespassers, also applies to those using private rights of way and entering under access agreements or orders under the National Parks and Access to the Countryside Act 1949 s 60 (see **OPEN SPACES AND COUNTRYSIDE** vol 78 (2010) PARA 583 et seq). However, when the right conferred by the Countryside and Rights of Way Act 2000 s 2(1) is exercisable in relation to land which is access land for the purposes of Pt I (ss 1-46) (see **OPEN SPACES AND COUNTRYSIDE**) the owner of the land owes only a limited duty under the Occupiers' Liability Act 1984 s 1: see s 1(6A)-(6C); and **NEGLIGENCE** vol 78 (2010) PARA 40.

The Occupiers' Liability Act 1984 replaces the prior law in respect of personal injury: see s 1(1); and **NEGLIGENCE** vol 78 (2010) PARA 40. Recovery for loss or damage to property is excluded by s 1(8), and this is still covered by the duty of common humanity in *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL; considered in *Tutton v AD Walter Ltd* [1986] QB 61, [1985] 3 All ER 757 (bees harmed by farming sprays not used according to instructions). The Occupiers' Liability Act 1984 refers to dangers 'due to the state of the premises or to things done or omitted to be done on them' (see s 1(1)(a)), and does not apply to dangers created by the trespasser's own conduct: *Tomlinson Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122. The Act is further restricted to liability as an occupier, and in *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA, it was held not to apply to the negligent shooting of a burglar, this being covered by common law.

3 See the Occupiers' Liability Act 1984 s 1(3)(a); and **NEGLIGENCE** vol 78 (2010) PARA 40.

4 Occupiers' Liability Act 1984 s 1(3)(b); and **NEGLIGENCE** vol 78 (2010) PARA 40. The occupier will be liable if he deliberately avoids knowledge (see *Swain v Natui Ram Puri* [1996] PIQR P442, CA), but the fact that the occupier attempts to prevent entrance when he does not know that a short cut is being used does not mean that he had reason to believe within the Occupiers' Liability Act 1984 s 1(3)(b) that a trespasser would come into the vicinity of the danger (*White v St Albans City and District Council* (1990) Times, 12 March, CA). See further *Donoghue v Folkestone Properties Ltd* [2003] EWCA Civ 231, [2003] QB 1008, [2003] 3 All ER 1101.

5 Occupiers' Liability Act 1984 s 1(3)(c). See further *Tomlinson Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46, [2003] 3 All ER 1122.

6 Occupiers' Liability Act 1984 s 1(4).

7 See the Occupiers' Liability Act 1984 s 1(5); and **NEGLIGENCE** vol 78 (2010) PARA 40. See also *Ratcliff v McConnell* [1999] 1 WLR 670, CA.

8 See the Occupiers' Liability Act 1984 s 1(6); and *Ratcliff v McConnell* [1999] 1 WLR 670, CA (dive into shallow pool).

9 If such exclusion is possible the Unfair Contract Terms Act 1977 will not apply to it since by s 1(1) that Act applies only to the Occupier's Liability Act 1957 and not the Occupier's Liability Act 1984. It might be that if the duty under the Act could be excluded, the duty of common humanity could not.

10 Before *British Railways Board v Herrington* [1972] AC 877, [1972] 1 All ER 749, HL, it had been held that the fact that a plaintiff had been a trespasser did not prevent a non-occupier owing a duty of reasonable care (see *Buckland v Guildford Gas Light and Coke Co* [1949] 1 KB 410, [1948] 2 All ER 1086), but some reservations were expressed in *British Railways Board v Herrington* [1972] AC 877 at 914, [1972] 1 All ER 749 at 772, HL, per

Lord Wilberforce, at 929 and 785 per Lord Pearson, and at 942 and 797 per Lord Diplock, suggesting that occupiers and non-occupiers should be treated alike.

11 See *Tutton v AD Walter Ltd* [1986] QB 61, [1985] 3 All ER 757, cited in note 2.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/444. Convicted persons.

#### **444. Convicted persons.**

Those convicted of crimes, whether or not they are in prison, have the same tortious rights and liabilities as others<sup>1</sup>.

1 The provision that disabled a convicted person from bringing any action during his imprisonment (see the Forfeiture Act 1870 s 8 (repealed)) was abolished by the Criminal Justice Act 1948 ss 70(1), 83(3), Sch 10 Pt I (repealed). As to the facilities afforded to a prisoner in connection with litigation see **PRISONS** vol 36(2) (Reissue) PARAS 606-607.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/445. Visiting forces.

#### **445. Visiting forces.**

The Visiting Forces Act 1952 extends various exemptions, privileges and immunities to certain visiting forces, and empowers the Secretary of State for Defence to make arrangements by which claims in respect of acts or omissions of members of visiting forces will be satisfied by the payment by the Secretary of State out of funds provided by Parliament<sup>1</sup>.

1 See the Visiting Forces Act 1952 ss 8(2), 9(1); and **ARMED FORCES**. The State Immunity Act 1978 Pt I (ss 1-17) does not apply to proceedings relating to anything done by or in relation to the armed forces of a state while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952: State Immunity Act 1978 s 16(2); and see *Littrel v United States of America (No 2)* [1994] 4 All ER 203, [1995] 1 WLR 82, CA (no action for personal injuries lay in respect of treatment at a US military hospital). See also PARA 420.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(4) SPECIFIC PARTIES IN ACTIONS IN TORT/446. Aliens.

#### **446. Aliens.**

An alien<sup>1</sup> has rights and liabilities in tort, but an alien enemy<sup>2</sup>, though he may be sued, cannot sue unless he is in the realm by licence of the Crown<sup>3</sup>. The rules relating to jurisdiction and choice of law in respect of torts committed abroad are dealt with elsewhere in this work<sup>4</sup>.

1 See **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARA 13.

2 See **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 574.

3 *Porter v Freudenberg, Kreglinger v S Samuel and Rosenfeld, Re Merten's Patent* [1915] 1 KB 857, CA. See further **CIVIL PROCEDURE** vol 11 (2009) PARA 207.

4 See PARAS 489-490; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 366 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(5) JOINT AND SEVERAL TORTFEASORS/447. Liability of joint tortfeasors.

## (5) JOINT AND SEVERAL TORTFEASORS

### 447. Liability of joint tortfeasors.

Each of two or more joint tortfeasors is liable for the entire damage resulting from the tort<sup>1</sup>. The following are joint tortfeasors:

- 8 (1) employer and employee where the employer is vicariously liable for the tort of the employee<sup>2</sup>;
- 9 (2) partners where they are liable for torts committed by any one of them while acting in the partnership's ordinary course of the business, or with the authority of his co-partners<sup>3</sup>;
- 10 (3) principal and agent where the principal is liable for the tort of the agent<sup>4</sup>;
- 11 (4) employer and independent contractor where the employer is liable for the tort of his independent contractor<sup>5</sup>;
- 12 (5) a person who instigates another to commit a tort and the person who then commits the tort<sup>6</sup>;
- 13 (6) persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort<sup>7</sup>.

Torts of all kinds may be joint<sup>8</sup>.

1 *Ferguson v Earl of Kinnoull* (1842) 9 Cl & Fin 251, HL; *Clark v Newsam* (1847) 1 Exch 131; *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 31, HL, per Lord Atkinson. As only one sum may be awarded in a single proceeding for a joint tort, any award of punitive damages should reflect only the lowest figure for which any of the joint tortfeasors can be held liable, if indeed an award of punitive damages is appropriate at all: *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1063, [1972] 1 All ER 801 at 817, HL, per Lord Hailsham of St Marylebone LC, at 1090 and 840 per Lord Reid, at 1096 and 845 per Lord Morris of Borth-y-Gest and at 1105 and 852-853 per Viscount Dilhorne. As to contribution between tortfeasors see PARA 450 et seq.

2 See PARA 680 et seq.

3 See PARA 432.

4 See **AGENCY** vol 1 (2008) PARAS 150-154.

5 See PARA 710.

6 *Monsanto plc v Tilly* [1999] NLJR 1833, [1999] All ER (D) 1321, [2000] Env LR 313, CA. Directors may be joint tortfeasors with a limited company where they directed or procured the tortious act or formed the company for the express purpose of doing a wrongful act: *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at 476, HL, per Lord Buckmaster.

Acts which merely facilitate or assist with the commission of a tort are not sufficient to give rise to liability as a joint tortfeasor: see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013, [1988] 2 All ER 484, HL.

7 *The Koursk* [1924] P 140, CA; *Brooke v Bool* [1928] 2 KB 578, DC; *Scarsbrook v Mason* [1961] 3 All ER 767 (cf *S v Walsall Metropolitan Borough Council* [1985] 3 All ER 294, [1985] 1 WLR 1150, CA); and *Credit Lyonnais*

*Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [1998] 1 Lloyd's Rep 19, CA; affd [2000] 1 AC 486, [1999] 1 All ER 929, HL.

8 For the applicability of these principles to defamation see *Gardiner v Moore* [1969] 1 QB 55, [1966] 1 All ER 365 (libel); *Chamberlain v White* (1623) Cro Jac 647 (slander); cf *Thomas v Moore* [1918] 1 KB 555, CA. See also **LIBEL AND SLANDER** vol 28 (Reissue) PARA 38.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(5) JOINT AND SEVERAL TORTFEASORS/448. Several tortfeasors.

#### **448. Several tortfeasors.**

If each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage<sup>1</sup>. If each of several persons commits an independent tort consecutively against the same person, each is liable for the damage caused by his tortious act, assuming the damage proximately caused by each tort to be distinct<sup>2</sup>. Thus, if the second tortfeasor's act caused no further damage or merely duplicated damage caused by the first tort, the second tortfeasor will not be liable<sup>3</sup>; but, if his act aggravated the damage caused by the first tort, each tortfeasor will be liable only in respect of the part of the damage which his tort caused, assuming that it is possible to separate and quantify the aggravation of damage<sup>4</sup>. Where liability is premised on the material contribution of several tortfeasors to the risk of harm, rather than to the harm itself, their liability is attributed according to their relative degree of contribution to the risk<sup>5</sup>, but an exception is made in the case of mesothelioma resulting from exposure to asbestos, where joint and several liability is stipulated by statute<sup>6</sup>.

1 *Devonshire (Owners) v Barge Leslie (Owners)* [1912] AC 634 at 657, HL; *Bank View Mill Ltd v Nelson Corp'n and Fryer & Co (Nelson) Ltd* [1942] 2 All ER 477 at 483 per Stable J (revsd on other grounds [1943] 1 KB 337, [1943] 1 All ER 299, CA); *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 at 189-190, [1961] 1 All ER 897 at 916, CA, per Devlin LJ; *Rahman v Arearose Ltd* [2001] QB 351 at [17], (2000) 62 BMLR 84 at [17], CA, per Laws LJ. Cf. As to contribution between tortfeasors see PARA 450 et seq.

2 See *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 at 188-189, [1961] 1 All ER 897 at 916, CA, per Devlin LJ; *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421, [2000] ICR 1086, CA; *Rahman v Arearose Ltd* [2001] QB 351, (2000) 62 BMLR 84, CA.

3 *Carslogie Steamship Co Ltd v Royal Norwegian Government* [1952] AC 292 at 303, [1952] 1 All ER 20 at 25, HL (explaining *The Haversham Grange* [1905] P 307, CA); *Performance Cars Ltd v Abraham* [1962] 1 QB 33, [1961] 3 All ER 413, CA; cf *Baker v Willoughby* [1970] AC 467, [1969] 3 All ER 1528, HL (effect of second tort on first tortfeasor's liability).

4 *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421, [2000] ICR 1086, CA; *Rahman v Arearose Ltd* [2001] QB 351, (2000) 62 BMLR 84, CA. In the absence of evidence to apportion damage between independent tortfeasors where the damage is not indivisible, the law will, it seems, apportion the damage equally: see *Bank View Mill Ltd v Nelson Corp'n and Fryer & Co (Nelson) Ltd* [1942] 2 All ER 477 at 483 per Stable J (revsd on other grounds [1943] KB 337, [1943] 1 All ER 299, CA).

5 *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, [2006] 3 All ER 785.

6 Compensation Act 2006 s 3. See **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 640.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(5) JOINT AND SEVERAL TORTFEASORS/449. Effect of judgment against, or release of, joint tortfeasor.

#### **449. Effect of judgment against, or release of, joint tortfeasor.**

Judgment recovered against any person liable in respect of any debt or damage is not a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage<sup>1</sup>. However, a satisfied judgment, except in the case of a foreign judgment<sup>2</sup>, is a bar to a claim against other tortfeasors, whether joint or several, who are liable for the same damage<sup>3</sup>.

A release under seal<sup>4</sup> or a release by way of accord and satisfaction<sup>5</sup> (but not a mere covenant not to sue<sup>6</sup>) in respect of one joint tortfeasor discharges the others, unless the claimant expressly or impliedly reserves his rights against the other tortfeasors<sup>7</sup>, but neither form of release has the same presumptive effect in the case of several tortfeasors<sup>8</sup>. However, acceptance of a settlement from one tortfeasor bars continuance of proceedings against another, whether the liability is joint or several, if the entire sum agreed upon is received and it was intended to be in full satisfaction of the claim<sup>9</sup>. In such a case, the compromise fixes the claim as if judgment had been given, and the claimant cannot subsequently contend that the settlement figure fell short of the claim's full value and thereby justify proceedings against another tortfeasor<sup>10</sup>.

1 Civil Liability (Contribution) Act 1978 s 3. This provision re-enacts and extends the Law Reform (Married Women and Tortfeasors) Act 1935 s 6(1)(a) (repealed), which abolished the former common law rule that judgment against one joint tortfeasor barred proceedings against the others. For the effect of the claimant's accepting payment into court by one defendant on his right to sue others jointly liable see *Townsend v Stone Toms & Partners* [1981] 2 All ER 690, [1981] 1 WLR 1153, CA, and CPR 36.12.

2 *Kohnke v Karger* [1951] 2 KB 670, [1951] 2 All ER 179. Damages recovered under the foreign judgment will be offset against any award in this country.

3 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL.

4 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 138.

5 See **CONTRACT** vol 9(1) (Reissue) PARA 1043 et seq.

6 See eg *Hutton v Eyre* (1815) 6 Taunt 289; *Duck v Mayeu* [1892] 2 QB 511, CA; *Apley Estates Co Ltd v De Bernales* [1947] Ch 217, [1947] 1 All ER 213, CA; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 138, 274.

7 *Watts v Aldington* (1993) [1999] L & TR 578, CA.

8 *Duck v Mayeu* [1892] 2 QB 511, CA; *Apley Estates Co Ltd v De Bernales* [1947] Ch 217, [1947] 1 All ER 213, CA; *Cutler v McPhail* [1962] 2 QB 292, [1962] 2 All ER 474; *Gardiner v Moore* [1969] 1 QB 55, [1966] 1 All ER 365.

9 *Clark v Urquhart* [1930] AC 28, HL; *Jameson v Central Electricity Generating Board (Babcock Energy Ltd, third party)* [2000] 1 AC 455, [1999] 1 All ER 193, HL; *Heaton v AXA Equity & Law Life Assurance Society plc* [2002] UKHL 15, [2002] 2 AC 329, [2002] 2 All ER 961, HL; *Cape & Dagleish (a firm) v Fitzgerald* [2002] UKHL 16, [2002] CP Rep 51, [2002] All ER (D) 231 (Apr).

10 *Jameson v Central Electricity Generating Board (Babcock Energy Ltd, third party)* [2000] 1 AC 455, [1999] 1 All ER 193, HL. Cf *Heaton v AXA Equity & Law Life Assurance Society plc* [2002] UKHL 15, [2002] 2 AC 329, [2002] 2 All ER 961 (compromise not intended as full satisfaction).

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(5) JOINT AND SEVERAL TORTFEASORS/450. Recovery of contribution.

#### **450. Recovery of contribution.**

With respect to damage which occurred after 31 December 1978<sup>1</sup>, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)<sup>2</sup>. A person is liable<sup>3</sup> in respect of any damage for these purposes if the person who suffered it (or anyone representing his estate or dependants<sup>4</sup>) is entitled to recover compensation<sup>5</sup> from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)<sup>6</sup>. The words 'same damage' bear their natural and ordinary meaning and no gloss on them is warranted<sup>7</sup>. It is not enough that the damage is substantially or materially similar<sup>8</sup>. Damage here is not to be equated with damages: damage suffered may be the same notwithstanding that the amount recoverable by way of damages might vary according to the cause of action which the claimant relies on<sup>9</sup>.

This right to recover contribution supersedes any right, other than an express contractual right, to recover contribution (as distinct from indemnity) otherwise than under the above principles in corresponding circumstances<sup>10</sup>.

1 The Civil Liability (Contribution) Act 1978 came into force on 1 January 1979: see s 10(2).

2 See the Civil Liability (Contribution) Act 1978 ss 1(1), 7(1); and **DAMAGES** vol 12(1) (Reissue) PARAS 837-839. See also *Adams v Associated Newspapers Ltd* [1999] EMLR 26, CA. The Civil Liability (Contribution) Act 1978 binds the Crown: s 5.

3 See *RA Lister & Co Ltd v EG Thompson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032, [1987] 1 WLR 1614 (liability unaffected by subsequent stay of action); *Abbey National Bank plc v Gouldman (t/a David Gouldman & Co)* [2003] EWHC 925 (Ch), [2003] 1 WLR 2042 (undertaking not to execute judgment not extinguishing liability).

4 'Dependants' has the same meaning as in the Fatal Accidents Act 1976 (see **NEGLIGENCE** vol 78 (2010) PARA 27): Civil Liability (Contribution) Act 1978 s 6(3).

5 References to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales: Civil Liability (Contribution) Act 1978 s 1(6). See **DAMAGES** vol 12(1) (Reissue) PARAS 837-847.

In *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendants)* [2002] UKHL 14 at [33], [2002] 2 All ER 801 at [33], [2002] 1 WLR 1397 at [33], Lord Steyn stated that a restitutionary claim could not be said to be one for 'damage suffered' and that the contrary decision in *Friends Provident Life Office v Hillier, Parker, May & Rowden (a firm) (Estates and General plc, third party)* [1997] QB 85, [1995] 4 All ER 260, CA, was incorrect. In *Charter plc v City Index Ltd (Gawler, Pt 20 defendants)* [2007] EWCA Civ 1382 at [27], [2008] Ch 313 at [27], [2008] 3 All ER 126 at [27], Carnwath LJ (with whose judgment Mummery LJ agreed) stated that Lord Steyn's words, considered as a general statement, seemed to go too far, at least where the restitutionary claim is for no more than the amount of the loss suffered by the claimant. See also the remarks of Arden LJ in the same case (at [66] et seq), and *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487 at [76]-[78], [2004] 2 Lloyd's Rep 319 at [76]-[78], [2004] 2 All ER (Comm) 289 at [76]-[78] per Clarke LJ, and at [87] per Sedley LJ.

6 See the Civil Liability (Contribution) Act 1978 s 6(1); and **DAMAGES** vol 12(1) (Reissue) PARA 838. Under the previous Act, the Law Reform (Married Women and Tortfeasors) Act 1935, which remains in force for damage occurring before 1 January 1979, these contribution provisions applied only as between tortfeasors. The words 'or otherwise' in the Civil Liability (Contribution) Act 1978 s 6(1) are wide enough to include judgments, including consent judgments, even if there was in fact no liability prior to the judgment: *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB), [2008] 1 WLR 2867, [2008] All ER (D) 338 (May).

Under the Civil Liability (Contribution) Act 1978, a person is not entitled to recover contribution or liable to make contribution by reference to any liability based on breach of any obligation assumed by him before 1 January 1979: s 7(2). Under s 7(2), a tortious duty of care which is an incident of the defendant's non-contractual relationship with the claimant is imposed by law and not assumed by him: *Lampitt v Poole Borough Council (Taylor, third party)* [1991] 2 QB 545, [1990] 2 All ER 887, CA.

7 *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendants)* [2002] UKHL 14, [2002] 2 All ER 801, [2002] 1 WLR 1397. See also *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1, [1996] 1 WLR 675, CA.

8 *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendants)* [2002] UKHL 14 at [27], [2002] 2 All ER 801 at [27], [2002] 1 WLR 1397 at [27] per Lord Steyn.

9 *Birse Construction Ltd v Haiste Ltd* [1996] 2 All ER 1 at 7, [1996] 1 WLR 675 at 682, CA, per Roch LJ; *Eastgate Group Ltd v Lindsey Morden Group Inc (Smith & Williamson (a firm), Pt 20 defendant)* [2001] EWCA Civ 1446, [2001] 2 All ER (Comm) 1050, [2002] 1 WLR 642; *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendants)* [2002] UKHL 14 at [6], [2002] 2 All ER 801 at [6], [2002] 1 WLR 1397 at [6] per Lord Bingham of Cornhill, and at [27] per Lord Steyn.

10 See the Civil Liability (Contribution) Act 1978 s 7(3); and **DAMAGES** vol 12(1) (Reissue) PARA 837. As to contractual indemnities and other contracts regulating contribution see PARA 455.

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#### 451. Entitlement to contribution.

A person is entitled to recover contribution<sup>1</sup> notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought<sup>2</sup>. A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) is entitled to recover contribution without regard to whether or not he himself is, or ever was, liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established<sup>3</sup>. Since it is necessary only for the parties to be liable for the same damage it is irrelevant whether they are jointly liable, and the legal basis for liability may differ as between the person claiming contribution and the person against whom the claim is made<sup>4</sup>.

1 See under the Civil Liability (Contribution) Act 1978 s 1(1): see PARA 450. See **DAMAGES** vol 12(1) (Reissue) PARAS 838-842. The statute creates an independent cause of action: *Virgo Steamship Co SA v Skaarup Shipping Corpn, The Kapetan Georgis* [1988] 1 Lloyd's Rep 352. A claim will pass to personal representatives even though liability was not established before the death: *Ronex Properties Ltd v John Laing Construction Ltd (Clarke Nicholls & Marcel (a firm), third party)* [1983] QB 398, [1982] 3 All ER 961, CA.

2 See the Civil Liability (Contribution) Act 1978 s 1(2); and **DAMAGES** vol 12(1) (Reissue) PARA 842. A claim for contribution must be brought within two years after the right to contribution accrued: see the Limitation Act 1980 s 10(1); and **LIMITATION PERIODS** vol 68 (2008) PARA 1006. The relevant date is the date of judgment or, where the case has been settled out of court, the date of the agreement to pay: see s 10(2)-(4); and **LIMITATION PERIODS** vol 68 (2008) PARA 1007. The period may be extended where the person seeking contribution is under a disability or is the victim of fraud, concealment or mistake: see s 10(5); and **LIMITATION PERIODS** vol 68 (2008) PARA 1007.

3 See the Civil Liability (Contribution) Act 1978 s 1(4); and **DAMAGES** vol 12(1) (Reissue) PARA 842. See *Arab Monetary Fund v Hashim (No 8)* (1993) Times, 17 June; *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [69]-[70], [2003] 2 AC 366 at [69]-[70], [2003] 1 All ER 97 at [69]-[70] per Lord Hobhouse; *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB), [2008] 1 WLR 2867, [2008] All ER (D) 338 (May). A compromise fixes a claim as a judgment does, so if a claim is made against a concurrent tortfeasor there can be no inquiry as to the full value of the claim but only as to whether it was in full and final settlement: *Jameson v Central Electricity Generating Board (Babcock Energy Ltd, third party)* [2000] 1 AC 455, [1999] 1 All ER 193, HL. Under the law in force before 1 January 1979 (ie the date on which the 1978 Act came into force), contribution could not be recovered unless the person seeking it would have been liable had the plaintiff sued him to judgment: *Stott v West Yorkshire Road Car Co Ltd (Home Bakeries Ltd, third party)* [1971] 2 QB 651, [1971] 3 All ER 534, CA.

4 See the Civil Liability (Contribution) Act 1978 ss 1(1), 6(1); and *Birse Construction Ltd v Haiste Ltd (Watson, third party)* [1996] 2 All ER 1, [1996] 1 WLR 675; *K v P* [1993] Ch 140, [1993] 1 All ER 521; *Société Commerciale de Réassurance v ERAS (International) Ltd* [1992] 1 Lloyd's Rep 570 at 600, CA; *Lampitt v Poole*

*Borough Council (Taylor, third party)* [1991] 2 QB 545 at 552, [1990] 2 All ER 887 at 890, CA, per Lord Donaldson of Lymington MR; *Friends Provident Life Office v Hillier, Parker, May & Rowden (a firm) (Estates and General plc, third party)* [1997] QB 85 at 102-103, [1995] 4 All ER 260 at 272, CA, per Auld LJ; *Royal Brompton Hospital NHS Trust v Hammond (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendants)* [2002] UKHL 14 at [40]-[41], [2002] 2 All ER 801 at [40]-[41], [2002] 1 WLR 1397 at [40]-[41] per Lord Hope of Craighead.

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#### 452. Liability to make contribution.

A person is liable to make contribution<sup>1</sup> notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based<sup>2</sup>. A judgment given in any action brought in any part of the United Kingdom<sup>3</sup> by or on behalf of the person who suffered the damage<sup>4</sup> in question against any person from whom contribution is sought is conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought<sup>5</sup>.

1     le under the Civil Liability (Contribution) Act 1978 s 1(1): see PARA 450; and **DAMAGES** vol 12(1) (Reissue) PARAS 840-843.

2     See the Civil Liability (Contribution) Act 1978 s 1(3); and **DAMAGES** vol 12(1) (Reissue) PARA 843. This reverses the decision in *George Wimpey & Co Ltd v British Overseas Airways Corp*n [1955] AC 169, [1954] 3 All ER 661, HL.

3     'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Isle of Man nor the Channel Islands are within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

4     An action brought by or on behalf of the person who suffered any damage includes an action brought for the benefit of his estate or dependants: see the Civil Liability (Contribution) Act 1978 s 6(2); and **DAMAGES** vol 12(1) (Reissue) PARA 840. As to the meaning of 'dependants' see PARA 450 note 4. Though English law is primarily applicable, s 1 also applies to actions brought by the application of foreign law by the operation of the rules of private international law, and it is irrelevant whether or not the liability was incurred in England and Wales: see *Logan v Uttlesford District Council and Hammond* [1986] NLJ Rep 541, CA; *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1038, [1987] 1 WLR 1614 at 1622; *Virgo Steamship Co SA v Skaarup Shipping Corp*n, *The Kapetan Georgis* [1988] 1 Lloyd's Rep 352; *Arab Monetary Fund v Hashim (No 9)* (1994) Times, 11 October. Since the enactment of the CPR, an action is now known as a claim: see **CIVIL PROCEDURE**.

5     See the Civil Liability (Contribution) Act 1978 s 1(5); and **DAMAGES** vol 12(1) (Reissue) PARA 843. Similarly, under the former law, a person who had been sued to judgment on the merits of the case and held not liable was not liable to make contribution: see *Hart v Hall and Pickles Ltd* [1969] 1 QB 405, [1968] 3 All ER 291, CA (but this would not have been so if the action had failed for want of prosecution, for that does not amount to being 'sued to judgment': *Hart v Hall and Pickles Ltd* [1969] 1 QB 405 at 411, [1968] 3 All ER 291 at 293, CA, per Lord Denning MR). The Civil Liability (Contribution) Act 1978 s 1(5) should not be construed to bar further proceedings by way of appeal in the original action: *Moy v Pettman Smith (a firm)* [2005] UKHL 7, [2005] 1 All ER 903, [2005] 1 WLR 581 at [3]-[13] per Lord Hope of Craighead, at [24] per Baroness Hale of Richmond and at [66]-[69] per Lord Carswell (obiter). See also *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd, The Benarty (No 2)* [1987] 3 All ER 1032 at 1039, [1987] 1 WLR 1614 at 1623 per Hobhouse J; *Nottingham Health Authority v Nottingham City Council* [1988] 1 WLR 903, CA; *Société Commerciale de Réassurance v ERAS (International) Ltd* [1992] 1 Lloyd's Rep 570. Ex turpi causa is not a defence to a claim for contribution: *K v P* [1993] Ch 140, [1993] 1 All ER 521.



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#### **453. Assessment and apportionment of contribution.**

In proceedings for contribution<sup>1</sup>, the amount of the contribution recoverable from any person is such as may be found by the court to be just and equitable having regard to that person's responsibility for the damage<sup>2</sup>; and the court has power to exempt any person from liability to make contribution, or to direct that the contribution is to amount to a complete indemnity<sup>3</sup>. The court must have regard both to causation and to the relative blameworthiness of the parties<sup>4</sup>. There is no automatic presumption that one form of liability attracts a larger share than another even in a case where one party has been fraudulent: everything depends on the facts<sup>5</sup>. In assessing the contribution recoverable, the court should consider the known or likely financial consequences of any contribution order made so, where the wrongdoing has produced not only a loss to the claimant but a profit to the defendants, it is just and equitable to direct that any contributions required to allocate the cost of meeting the claim fairly among those responsible should be paid first out of their retained profits<sup>6</sup>. Similarly, the court should take into account the known insolvency of one of the defendants<sup>7</sup>.

In cases of vicarious liability, where the issue of contribution arises between the employer (or principal) and another tortfeasor, the vicariously liable employer stands in his employee's shoes, and has in law the same responsibility, so his own personal innocence is irrelevant<sup>8</sup>, though if the employee's tortious acts included acts committed both within and without the scope of his employment, or if the employer was also to some degree personally to blame, the assessment of the employer's responsibility may have to be adjusted accordingly<sup>9</sup>. In the ordinary course, orders for contribution payments are made severally against the persons concerned, but there is no reason in principle why the court should not make two defendants jointly and severally liable to a third so as to make provision for what is to occur in the event of insolvency<sup>10</sup>.

Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it<sup>11</sup> against the person from whom the contribution is sought was or would have been subject to any limit imposed by or under any enactment or by any agreement made before the damage occurred<sup>12</sup> or any reduction for contributory negligence<sup>13</sup>, or any corresponding limit or reduction under the law of a country outside England and Wales<sup>14</sup>, the person from whom the contribution is sought is not, by virtue of any contribution awarded, required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced<sup>15</sup>. The apportionment of liability between the claimant and the defendants on grounds of contributory negligence is a separate and prior issue for determination from the issue of apportionment or contribution between the defendants<sup>16</sup>.

The assessment of contribution does not affect or concern the claimant, and it may be sought by one of the persons concerned either on application at the close of the claimant's action without formal or separate proceedings<sup>17</sup> or by an additional claim<sup>18</sup>. An apportionment made by the trial judge will only be altered on appeal when it is clearly wrong or there has been an error in principle or a mistake of fact<sup>19</sup>.

1     I.e. under the Civil Liability (Contribution) Act 1978 s 1(1): see PARA 450; and **DAMAGES** vol 12(1) (Reissue) PARA 844.

2     See the Civil Liability (Contribution) Act 1978 s 2(1); and **DAMAGES** vol 12(1) (Reissue) PARA 844. This provision substantially re-enacts part of the Law Reform (Married Women and Tortfeasors) Act 1935 s 6(2) (repealed). For decisions under the earlier legislation *Burnham v Boyer and Brown* [1936] 2 All ER 1165; *Croston v Vaughan* [1938] 1 KB 540, [1937] 4 All ER 249, CA; *Daniel v Rickett, Cockerell & Co Ltd and Raymond* [1938] 2

KB 322, [1938] 2 All ER 631; *Smith v Bray (Wickham, third party)* (1939) 56 TLR 200; *Rippon v Port of London Authority and Russell & Co* [1940] 1 KB 858, [1940] 1 All ER 637; *Collins v Hertfordshire County Council* [1947] KB 598, [1947] 1 All ER 633; *Weaver v Commercial Process Co Ltd* (1947) 63 TLR 466; *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *Randolph v Tuck* [1962] 1 QB 175, [1961] 1 All ER 814; *Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003.

3 See the Civil Liability (Contribution) Act 1978 s 2(2); and *Diboll v City of Newcastle* [1993] PIQR P16, CA; *Adams v Associated Newspapers Ltd* [1999] EMLR 26, CA; *Cressman v Coys of Kensington (McDonald, Pt 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775, 148 Sol Jo LB 182; *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 2 Lloyd's Rep 319, [2004] 2 All ER (Comm) 289 at [50], [73] and [78] per Clarke LJ, and at [81] per Sedley LJ; *Charter plc v City Index Ltd (Gawler, Pt 20 defendants)* [2007] EWCA Civ 1382, [2008] Ch 313, [2008] 3 All ER 126. See also **DAMAGES** vol 12(1) (Reissue) PARA 844. A person who is only vicariously liable may be allowed a complete indemnity: *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 125, HL; *Nelhams v Sandwell's Maintenance Ltd and Gillespie (UK) Ltd* [1996] PIQR P52, CA. As to the employee's liability to make contribution to another liable party, in the context of the gentleman's agreement by insurers not to claim against the employee of an insured employer in respect of injury to a fellow employee, except in clear cases of collusion or wilful misconduct, see *Morris v Ford Motor Co Ltd (Cameron Industrial Services Ltd, third party) (Roberts, fourth party)* [1973] QB 792, [1973] 2 All ER 1084, CA. Cf *The Yasin* [1979] 2 Lloyd's Rep 45.

The Civil Liability (Contribution) Act 1978 s 2(2) substantially re-enacts part of the Law Reform (Married Women and Tortfeasors) Act 1935 s 6(2) (repealed). For decisions under the earlier legislation see *Ryan v Fildes* [1938] 3 All ER 517; *Jones v Manchester Corpn* [1952] 2 QB 852, [1952] 2 All ER 125, CA; *Semtex Ltd v Gladstone* [1954] 2 All ER 206, [1954] 1 WLR 945; *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, [1958] 1 All ER 657; *The Thomas Saunders Partnership v Harvey* (1989) 30 Con LR 103.

4 *Miraflores (Owners) v George Livanos (Owners)* [1967] 1 AC 826 at 845, sub nom *The Miraflores (Owners) and The Abadesa (Owners)* [1967] 1 All ER 672 at 677, HL, per Lord Pearce; *Brown v Thompson* [1968] 2 All ER 708 at 709, [1968] 1 WLR 1003 at 1008, CA, per Winn LJ; *Baker v Willoughby* [1970] AC 467 at 490, [1969] 3 All ER 1528 at 1530, HL, per Lord Reid; *Madden v Quirk* [1989] 1 WLR 702 at 707, [1989] RTR 304 at 309 per Simon Brown J. In apportioning damages the court may exceptionally have regard to non-causative aspects of a defendant's conduct if there is a close connection between them and the acts or omissions giving rise to liability: *Re-Source America International Ltd v Platt Site Services Ltd (Barkin Construction Ltd, Pt 20 defendant)* [2004] EWCA Civ 665, (2004) 95 Con LR 1; *Brian Warwicker Partnership v HOK International Ltd (HOK International Ltd, Pt 20 defendant)* [2005] EWCA Civ 962, 103 Con LR 112. In apportioning damages the court cannot have regard to the possible liability of a person who is not a party before the court: *Maxfield v Llewellyn* [1961] 3 All ER 95, [1961] 1 WLR 1119, CA; *Saipem SpA and Conoco (UK) Ltd v Dredging VO2 BV and Geosite Surveys Ltd, The Volvox Hollandia (No 2)* [1993] 2 Lloyd's Rep 315.

5 *Charter plc v City Index Ltd (Gawler, Pt 20 defendants)* [2007] EWCA Civ 1382, [2008] Ch 313, [2008] 3 All ER 126; *Greene Wood & McClean (A Firm) v Templeton Insurance Ltd* [2009] EWCA Civ 65 at [59], [2009] 1 WLR 2013 at [59], [2009] CP Rep 24 at [59] per Carnwath LJ.

6 *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97.

7 *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [52], [2003] 2 AC 366 at [52], [2003] 1 All ER 97 at [52] per Lord Nicholls of Birkenhead.

8 *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97; *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, [2006] Lloyd's Rep IR 307, [2006] IRLR 817.

9 *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [75], [2003] 2 AC 366 at [75], [2003] 1 All ER 97 at [75] per Lord Hobhouse. Cf *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, [2006] Lloyd's Rep IR 307, [2006] IRLR 817 (nil contribution because negligence had negligible causative effect).

10 *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97 (see especially at [63] per Lord Nicholls of Birkenhead, at [78] per Lord Hobhouse, and at [167] per Lord Millett).

11 As to the meaning of 'action brought by or on behalf of the person who suffered any damage' see PARA 452 note 4.

12 See the Civil Liability (Contribution) Act 1978 s 2(3)(a); and **DAMAGES** vol 12(1) (Reissue) PARA 845.

13 See the Civil Liability (Contribution) Act 1978 s 2(3)(b); and **DAMAGES** vol 12(1) (Reissue) PARA 845. The reduction referred to is one by virtue of the Law Reform (Contributory Negligence) Act 1945 s 1 or the Fatal

Accidents Act 1976 s 5: see **NEGLIGENCE** vol 78 (2010) PARA 25 et seq. Although contributory negligence may be ignored in the claim against one defendant because that defendant was in fraud, the amount of contribution that the other defendant may be ordered to make should not be assessed by treating the damage for which both defendants are responsible as the totality of the claimant's loss, ignoring contributory negligence, when the only reason for ignoring it is that the claim against the first defendant is in deceit: see *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm), [2009] 2 All ER (Comm) 715, [2010] 1 WLR 258.

14 See the Civil Liability (Contribution) Act 1978 s 2(3)(c); and **DAMAGES** vol 12(1) (Reissue) PARA 845.

15 See the Civil Liability (Contribution) Act 1978 s 2(3); and **DAMAGES** vol 12(1) (Reissue) PARA 845. This provision was necessitated by the extension of the Act to breaches of contract, in order to deal with contracts which contain either waivers of liability or limitations by virtue of a liquidated damages clause.

16 *Fitzgerald v Lane* [1989] AC 328 at 339, [1988] 2 All ER 961 at 965, HL, per Lord Ackner.

17 *Croston v Vaughan* [1938] 1 KB 540, [1937] 4 All ER 249, CA; *Bell v Holmes* [1956] 3 All ER 449, [1956] 1 WLR 1359; *T Oertli AG v EJ Bowman (London) Ltd* [1956] RPC 341. Separate proceedings may be necessary if discovery or interrogatories are required: *Clayson v Rolls Royce* [1951] 1 KB 746, [1950] 2 All ER 884, CA. The court also has power to determine the issue of contribution between defendants where the claimant's action has been settled and there are no formal third party proceedings: *Stott v West Yorkshire Road Car Co Ltd (Home Bakeries Ltd, third party)* [1971] 2 QB 651, [1971] 3 All ER 534, CA.

18 See CPR Pt 20; and **CIVIL PROCEDURE**.

19 *Ingram v United Automobile Service Ltd* [1943] KB 612, [1943] 2 All ER 71, CA; *British Fame (Owners) v Macgregor (Owners)*, *The Macgregor* [1943] AC 197, [1943] 1 All ER 33, HL; *Brown v Thompson* [1968] 2 All ER 708, [1968] 1 WLR 1003, CA; *Diboll v City of Newcastle* [1993] PIQR P16, CA; *Parkman Consulting Engineers v Cumbrian Industrials Ltd* [2001] EWCA Civ 1621, [2002] BLR 64. See **DAMAGES** vol 12(1) (Reissue) PARA 846. If the error does not affect the result, there is no need for the appellate court to set the apportionment aside and re-examine the question for itself: *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97.

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#### 454. Costs.

Where the damages assessed have been apportioned as between defendants, the costs remain entirely within the court's discretion<sup>1</sup>. Costs need not therefore be apportioned between the defendants in the same proportion as the damages<sup>2</sup>. There is some authority that a party claiming contribution may recover a contribution towards a payment made in respect of the injured party's costs<sup>3</sup>. If more than one action<sup>4</sup> is brought in respect of any damage by or on behalf of the person by whom it was suffered<sup>5</sup> against persons liable in respect of the damage (whether jointly or otherwise) the claimant is not entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action<sup>6</sup>.

1 See **DAMAGES** vol 12(1) (Reissue) PARA 847; **CIVIL PROCEDURE**.

2 *Moy v Pettman Smith (a firm) (No 2)* [2003] EWCA Civ 467, [2003] PNLR 31 (revsd on other grounds: [2005] UKHL 7, [2005] 1 All ER 903, [2005] 1 WLR 581); *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm), [2009] 2 All ER (Comm) 715, [2009] 1 Lloyd's Rep 447. Cf apportionment of cases between claimant and defendant where there is a successful defence of contributory negligence: *William A Jay & Sons v JS Veevers Ltd* [1946] 1 All ER 646; *Howitt v Alexander & Sons* 1948 SC 154, Ct of Sess; *McCarthy v Raylton Productions Ltd* [1951] WN 376, CA (costs following the event). As to the situation where the claimant counterclaims see *Smith v WH Smith & Sons Ltd* [1952] 1 All ER 528, CA.

3 *Parkman Consulting Engineers v Cumbrian Industrials Ltd* [2001] EWCA Civ 1621 at [123], [2002] BLR 64 at [123] per Henry LJ; *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm), [2009] 2 All ER (Comm) 715, [2009] 1 Lloyd's Rep 447.

4 'Action' means an action brought in England and Wales: see the Civil Liability (Contribution) Act 1978 s 6(4); and **DAMAGES** vol 12(1) (Reissue) PARA 838.

5 As to the meaning of 'action brought by or on behalf of the person who suffered any damage' see PARA 452 note 4.

6 See the Civil Liability (Contribution) Act 1978 s 4; and **DAMAGES** vol 12(1) (Reissue) PARA 847. This provision replaces the Law Reform (Married Women and Tortfeasors) Act 1935 s 6(1)(b) (repealed). It differs in applying to all causes of action, and not merely to torts, and in abolishing the rule that damages in later actions cannot exceed those awarded in the first.

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#### 455. Contractual indemnity.

The statutory right to contribution<sup>1</sup> does not affect any express or implied contractual or other right to indemnity<sup>2</sup> or any express contractual provision regulating or excluding contribution<sup>3</sup> which would otherwise be enforceable, or render enforceable any agreement for indemnity or contribution which would not otherwise be enforceable<sup>4</sup>. A contractual indemnity against liability in respect of a deliberate wrongful act is unenforceable, irrespective of whether it is criminal as well as tortious<sup>5</sup>. A contractual indemnity against liability in respect of an unintentional tort, including one arising under a contract of insurance, may be enforced even though the tort also amounts to a criminal offence<sup>6</sup>. An agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter is not unlawful unless at the time of publication that person knows that the matter is defamatory, and does not reasonably believe there is a good defence to any action brought upon it<sup>7</sup>.

1 See under the Civil Liability (Contribution) Act 1978 s 1(1): see PARA 450; and **DAMAGES** vol 12(1) (Reissue) PARA 837.

2 See the Civil Liability (Contribution) Act 1978 s 7(3)(a); and **DAMAGES** vol 12(1) (Reissue) PARA 837. As to implied contractual indemnities see *Rippon v Port of London Authority and Russell & Co* [1940] 1 KB 858, [1940] 1 All ER 637; *Lexmead (Basingstoke Ltd) v Lewis* [1982] AC 225, sub nom *Lambert v Lewis* [1981] 1 All ER 1185, HL.

3 See the Civil Liability (Contribution) Act 1978 s 7(3)(b); and *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd (Carillion Construction Ltd, Pt 20 defendants)* [2002] UKHL 17, [2002] 1 All ER (Comm) 918, [2002] 1 WLR 1419 (exclusion of contribution). See also **DAMAGES** vol 12(1) (Reissue) PARA 837.

4 See the Civil Liability (Contribution) Act 1978 s 7(3); and **DAMAGES** vol 12(1) (Reissue) PARA 837. This substantially reproduces the Law Reform (Married Women and Tortfeasors) Act 1935 s 6(4)(c) (repealed). Indemnities and contractual provisions regulating or excluding contribution are not exclusions or restrictions of liability for the purposes of the Unfair Contract Terms Act 1977: *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA.

5 *WH Smith & Son v Clinton and Harris* (1908) 99 LT 840. See also *Haseldine v Hosken* [1933] 1 KB 822 (intentional act done without knowledge of its unlawfulness). But an indemnity may be enforceable against a person who induces wrongdoing by fraud: *Burrows v Rhodes and Jameson* [1899] 1 QB 816.

6 *Arthur White Contractors Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508, HL, where the House of Lords enforced the contractual indemnity even though a defendant was guilty of a criminal offence. It has long been the law that an insured motorist is entitled to indemnity under his motor insurance even in respect of an accident for which he is convicted of manslaughter: *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327; *James v British General Insurance Co Ltd* [1927] 2 KB 311. Cf *Charlton v Fisher* [2001] EWCA Civ 112, [2002] QB 578, [2001] 1 All ER (Comm) 769 (deliberate ramming). The indemnity may be

unenforceable, though the liability results from an unintended act, if this was done in the course of deliberate violent conduct: *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA. See also **DAMAGES** vol 12(1) (Reissue) PARA 844; **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1269-1270.

7 Defamation Act 1952 s 11.

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## **(6) DEFENCES**

### **456. Acts of state.**

There is no liability in tort for acts which constitute the performance of acts of state, being the exercise of the sovereign power towards persons who owe no allegiance to the Crown or who are not friendly aliens resident, or perhaps merely present, in British territory<sup>1</sup>.

1 See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 388; **INTERNATIONAL RELATIONS LAW**. See also *Buron v Denman* (1848) 2 Exch 167; *Walker v Baird* [1892] AC 491, PC; *A-G v Nissan* [1970] AC 179, [1969] 1 All ER 629, HL. In the last of these cases, the House of Lords left undecided whether act of state could ever be pleaded against British subjects for acts outside the realm. In *Al Jedda v Secretary of State for Defence* [2009] EWHC 397 (QB) at [78]-[87], [2009] All ER (D) 77 (Mar) at [78]-[87], Underhill J preferred the view that it could. In British territory the defence may be available against an alien enemy (*R v Bottrill, ex p Kuechenmeister* [1947] KB 41, [1946] 2 All ER 434, CA) or perhaps against a friendly alien resident in the realm who has broken his duty of temporary allegiance, but it may be that the Crown must indicate that it has withdrawn protection (*Johnstone v Pedlar* [1921] 2 AC 262, HL).

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/457. Statutory authority.

### **457. Statutory authority.**

No liability in tort can arise from acts done in pursuance, and within the scope, of statutory powers where the powers are exercised in good faith, reasonably, without negligence and for the purpose for which, and in the manner which, the statute provides<sup>1</sup>.

1 See PARA 720; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 189-195.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/458. Judicial acts and ministerial execution of decrees.

### **458. Judicial acts and ministerial execution of decrees.**

Persons exercising judicial functions in a court of justice acting within its jurisdiction are exempt from all civil liability for anything done or said by them in their judicial capacity<sup>1</sup>. Liability may, however, arise for judicial acts in excess of jurisdiction that are done in bad faith<sup>2</sup>. In general, ministerial officers acting in obedience to decrees of a court of justice are not liable for acts so done<sup>3</sup>.

1 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 197 et seq. As regards absolute privilege from liability for defamation see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 99. As to the liability of members of courts-martial see **ARMED FORCES**. See also *Anderson v Gorrie* [1895] 1 QB 668, CA; *Fray v Blackburn* (1863) 3 B & S 576; *Re McC (A Minor)* [1985] AC 528, sub nom *McC v Mullan* [1984] 3 All ER 908, HL. For the limitation on proceedings in respect of a judicial act under the Human Rights Act 1998 see s 9; and **COURTS** vol 10 (Reissue) PARA 316.

2 *Re McC (A Minor)* [1985] AC 528 at 540, sub nom *McC v Mullan* [1984] 3 All ER 908 at 916, HL, per Lord Bridge of Harwich. No action lies against a justice of the peace (or a justices' clerk or an assistant clerk) in respect of what he does or omits to do in the execution of his duty as a justice of the peace (or as a justice's clerk or assistant clerk exercising, by virtue of an enactment, a function of a single justice of the peace) in relation to a matter within his jurisdiction: Courts Act 2003 s 31(1), (2). An action lies against a justice of the peace (or a justices' clerk or an assistant clerk) in the purported exercise of his duty (as specified above) in relation to a matter not within his jurisdiction if, but only if, he acted in bad faith: Courts Act 2003 s 32(1), (2); and see **MAGISTRATES**.

In proceedings brought under the Human Rights Act 1998, damages may be awarded in respect of judicial acts in excess of jurisdiction that are done in good faith in order to compensate a person to the extent required by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5(5) (compensation for arrest or detention in breach of Convention): Human Rights Act 1998 s 9(3). Such awards are to be made against the Crown: s 9(4). See also *D v Home Office* [2005] EWCA Civ 38, [2006] 1 All ER 183, [2006] 1 WLR 1003 at [119] per Brooke LJ.

3 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 206. As to liability for wrongful execution see **CIVIL PROCEDURE**; and as to the protection of the sheriff acting under a writ of execution see **SHERIFFS** vol 42 (Reissue) PARA 1133. See also *Dews v Riley* (1851) 11 CB 434; *Demer v Cook* (1903) 88 LT 629.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/459. Justification.

## 459. Justification.

In the exercise of legitimate self-redress or self-defence or the protection of property, acts may be done lawfully which otherwise would be actionable, the legitimacy of the acts providing a defence to any claim in respect of them<sup>1</sup>. Acts otherwise amounting to battery or false imprisonment may be justified as reasonable punishment of the actor's child, provided the punishment is not excessive and does not cause actual bodily harm<sup>2</sup>. Acts otherwise amounting to battery may be justified as done in the course of lawful arrest, if the force used is necessary and not more than is reasonably required<sup>3</sup>. So, too, a tortious act may be justified as done for the prevention of crime<sup>4</sup> or in time of war for the safety of the realm<sup>5</sup>; and an act which causes damage to property and which would otherwise be tortious may in certain circumstances be justified by reasonable necessity for preventing loss of life if the necessity did not arise from the defendant's neglect<sup>6</sup>, or for preventing the spread of fire<sup>7</sup>.

More specifically, justification is a defence to a defamation action, and consists in proving the truth of the allegation of which the claimant complains<sup>8</sup>.

Certain statutes justify what would otherwise be trespass to land<sup>9</sup>.

1 As to the remedy of self-redress see PARAS 476-477; and as to self-defence and protection of property see PARAS 460-461.

2 Children Act 2004 s 58(3), (4); and see *Murray v Moutrie* (1834) 4 Car & P 471 at 473 per Tindal CJ; *Winterburn v Brooks* (1846) 2 Car & Kir 16; cf *Anon* (circa 1695) 3 Salk 46. Corporal punishment by teachers in either state or independent schools cannot now be used as a justification for battery: see the Education Act 1996 s 548; PARAS 437, 536; and **EDUCATION** vol 15(1) (2006 Reissue) PARA 577. As to reasonable punishment see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 124.

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 926.

4 See *Handcock v Baker* (1800) 2 Bos & P 260, where breaking and entering the plaintiff's house and imprisoning him was justified as it was done to prevent him murdering his wife.

5 See *Maleverer v Spinke* (1537) 1 Dyer 35b at 36b.

6 *Mouse's Case* (1608) 12 Co Rep 63. As to forcible entry see PARA 587. As to abatement see PARA 477. As to retaking goods see PARA 476; and **TORT** vol 45(2) (Reissue) PARA 670. As to necessity generally see PARA 462.

7 See *Maleverer v Spinke* (1537) 1 Dyer 35b at 36b; *Dewey v White* (1827) Mood & M 56; and **FIRE SERVICES**. Cf PARA 461 text and note 4.

8 See **LIBEL AND SLANDER** vol 28 (Reissue) PARA 82 et seq.

9 See eg the Countryside and Rights of Way Act 2000 (see **OPEN SPACES AND COUNTRYSIDE**); the Police and Criminal Evidence Act 1984 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**); and the Access to Neighbouring Land Act 1992 (see **EASEMENTS AND PROFITS A PRENDRE**). See also *Grove v Eastern Gas Board* [1952] 1 KB 77, [1951] 2 All ER 1051 (forcible entry by gas board justified by statutory powers).

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/460. Self-defence.

#### **460. Self-defence.**

Every person is justified in using reasonable force to defend himself and those under his care, but the force justifiable is such only as is reasonably necessary<sup>1</sup>.

1 See PARAS 532-533; and *Cook v Beal* (1696) 1 Ld Raym 176 at 177; *Cockcroft v Smith* (1705) 2 Salk 642; *Turner (otherwise Robertson) v Metro-Goldwyn-Mayer* [1950] 1 All ER 449 at 471, HL, per Lord Oaksey (measure of force).

A person is not entitled to use force in self-defence merely because he believes he is under threat, when in fact he is not, but it has not yet been decided whether he must actually be under attack or under threat of imminent attack, or if it is enough that he reasonably believed this to be the case: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962, [2008] 3 All ER 573.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/461. Protection of property.

#### **461. Protection of property.**

A person is justified in using force to resist a person seeking to take his goods by force or coming on his land by force<sup>1</sup>, but no more force than is necessary or commensurate may be used and, if the entry was peaceable, a request to depart should be made before a trespasser is expelled<sup>2</sup>. Similarly, a person is justified in driving away from his land something that will harm it and seeks to come upon it, even if the consequence is that it goes or remains on the land of another<sup>3</sup>; and a person is justified in taking reasonable steps, even though it involves the use of force, to prevent interference with an incorporeal hereditament, such as a right of shooting<sup>4</sup>. However, the setting of traps calculated to cause grievous bodily harm is prohibited by statute<sup>5</sup>, and tame or domestic animals may not be shot unless there is no other means of protecting the property<sup>6</sup>. If a private right of way is obstructed by the grantor, the grantee has a right to deviate over the grantor's land and to justify on this ground acts that otherwise would be a trespass<sup>7</sup>.

1 *Weaver v Bush* (1798) 8 Term Rep 78. A person using force to defend property must either have possession or the right to possession: *Holmes v Bagge* (1853) 1 E & B 782 (cricket field); *Dean v Hogg* (1834) 10 Bing 345 (boat); *Roberts v Tayler* (1845) 1 CB 117. A person without possession may use force in order to exercise statutory powers: *R v Chief Constable Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458, [1981] 3 All ER 826. Cf *Stroud v Bradbury* [1952] 2 All ER 76 (an inspector who sought to carry out drainage work without giving prescribed statutory notice could be lawfully resisted with a spade and pole).

2 See PARAS 586-587. Cf *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA (occupier liable in negligence for shooting trespasser without warning); and **NEGLIGENCE** vol 78 (2010) PARA 40. But an innkeeper was not justified in wounding a man who refused to leave hostelry after a quarrel (*Moriarty v Brooks* (1834) 6 C & P 684, Ex Ch).

3 See **NUISANCE** vol 78 (2010) PARA 196. See also *R v Pagham, Sussex Sewers Comrs* (1828) 8 B & C 355; *Nield v London and North Western Rly Co* (1874) LR 10 Exch 4; *Greyvensteyn v Hattigh* [1911] AC 355, PC (swarm of locusts driven from boundary of land); *Maxey Drainage Board v Great Northern Rly Co* (1912) 106 LT 429 (embankment against flood water); *Gerrard v Crowe* [1921] 1 AC 395, PC; *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, HL; *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] QB 339, [1987] 1 All ER 637. The principle is limited in that, while the owner is entitled to protect himself against such incursions, if the incursion has already happened or is about to happen he must not export it to his neighbour: *Arscott v Coal Authority* [2004] EWCA Civ 892, [2004] All ER (D) 194 (Jul), [2005] Env LR 6. See also *Whalley v Lancashire and Yorkshire Rly Co* (1884) 13 QBD 131, CA.

4 *Harrison v Duke of Rutland* [1893] 1 QB 142, CA (trespasser interfering with sporting rights); *Cope v Sharpe (No 2)* [1912] 1 KB 496, CA (gamekeeper setting fire to strips of heather to protect sporting rights).

5 See the Offences Against the Person Act 1861 s 31; and **ANIMALS** vol 2 (2008) PARA 802.

6 *Cresswell v Sirl* [1948] 1 KB 241, [1947] 2 All ER 730, CA (dog); *Hamps v Darby* [1948] 2 KB 311, [1948] 2 All ER 474, CA (homing pigeons). Cf *Deane v Clayton* (1817) 7 Taunt 489 (unlawful traps); *Tutton v AD Walter Ltd* [1986] QB 61, [1985] 3 All ER 757 (liability in negligence for spraying crop with insecticide, killing the claimants' bees). See also **ANIMALS** vol 2 (2008) PARAS 742, 929. As to the killing of or injury to dogs worrying livestock see now the Animals Act 1971 s 9; and **ANIMALS** vol 2 (2008) PARA 928.

7 *Selby v Nettlefold* (1873) 9 Ch App 111, CA. See **EASEMENTS AND PROFITS A PRENDRE**. As to trespass to land see PARA 562 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/462. Necessity.

## 462. Necessity.

The defence of necessity is a special application of the wider defence of justification<sup>1</sup>. The defence of necessity is available in respect of what would otherwise be a tortious interference with persons<sup>2</sup> or property<sup>3</sup> in order to avoid greater harm. The action may be taken for either public<sup>4</sup> or private<sup>5</sup> purposes, but must not be negligent<sup>6</sup>.

1 See PARA 459.

2 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL. A child or an unconscious or severely handicapped person may be medically treated without consent in his best interests, but a fully competent adult may not be so treated, no matter how great the risk of serious consequences unless (inter alia) the medical practitioner reasonably believes the patient lacks capacity in relation to the matter: see the Mental Capacity Act 2005 s 5. As to children see *Re M (Child: Refusal of Medical Treatment)* [1999] 2 FCR 577, [1999] 2 FLR 1097. As to fully competent adults see *St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1999] Fam 26, [1998] 3 All ER 673, CA; *Secretary of State for the Home Department v Robb* [1995] Fam 127, [1995] 1 All ER 677 (no duty to force-feed prisoner on hunger-strike) (not following *Leigh v Gladstone* (1906) 26 TLR 139). As regards adults lacking capacity see *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545, HL; *Re T (Adult: Refusal of treatment)* [1993] Fam 95, sub nom *Re T (Adult: Refusal of medical treatment)* [1992] 4 All ER 649, CA; *Re MB (Adult: medical treatment)* [1997] 2 FCR 541, [1997] 2 FLR 426, CA; *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, [2000] 2 FCR 452 (assessment of best interests). A pregnant woman's entitlement to decide whether to



undergo medical treatment is undiminished by her pregnancy, and prevails over the interests of the unborn child: *St George's Healthcare NHS Trust v S, R v Collins, ex p S* [1999] Fam 26, [1998] 3 All ER 673, CA.

3 *Mouse's Case* (1609) 12 Co Rep 63 (jettison); *Handcock v Baker* (1800) 2 Bos & P 260 (breaking and entry to prevent murder); *Dewey v White* (1827) Mood & M 56 (demolishing structure rendered dangerous by fire); *Cope v Sharpe (No 2)* [1912] 1 KB 496, CA (entering land and burning heather to create fire break); cf *Carter v Thomas* [1893] 1 QB 673 (officious interference with fire fighters; assault); *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 at 165, [1964] 2 All ER 348 at 396, HL, per Lord Upjohn (pulling down property to prevent the spread of fire is now likely to be unreasonable: one should normally call the fire brigade). More may be done to save human life than property: *Southport Corp v Esso Petroleum Co Ltd* [1953] 2 All ER 1204 at 1209-1210, [1953] 3 WLR 773 at 778-779 per Devlin J (affd *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218, [1955] 3 All ER 864, HL). It is doubtful if a party whose property has been harmed may claim compensation: *Dewey v White* (1827) Mood & M 56; *Governor and Co of British Cast Plate Manufacturers v Meredith* (1794) 4 Term Rep 794 at 797 obiter per Buller J; *Southport Corp v Esso Petroleum Co Ltd* [1953] 2 All ER 1204 at 1209, [1953] 3 WLR 773 at 778 per Devlin J. As to acts done by the Crown in defence of the realm see *The Case of Saltpetre* (1606) 12 Co Rep 12; *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, HL; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348, HL (revsd by the War Damage Act 1965 s 1(1)); *A-G v Nissan* [1970] AC 179 at 227-228, [1969] 1 All ER 629 at 651, HL, per Lord Pearce (Crown must pay for property taken in exercise of prerogative).

The defence is narrowly circumscribed and requires extreme need: *Southwark London Borough Council v Williams* [1971] Ch 734, [1971] 2 All ER 175, CA (necessity did not excuse squatting by homeless); *John Trenberth Ltd v National Westminster Bank* (1979) 39 P & CR 104 (need to repair buildings did not excuse entry without permission on adjacent land; but see now the Access to Neighbouring Land Act 1992 s 1(2) making provision for court order on application).

4 Eg defence of the realm (see *Case of Saltpetre* (1606) 12 Co Rep 12; *A-G v De Keyser's Royal Hotel* [1920] AC 508, HL; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348, HL); safety of highway (see *Dewey v White* (1827) Mood & M 56); saving life (see *Mouse's Case* (1609) 12 Co Rep 63; *Howard v Frith* (1666) 2 Keb 58; *Handcock v Baker* (1800) 2 Bos & P 260 (prevention of murder)).

5 *Cope v Sharpe (No 2)* [1912] 1 KB 496 (saving property from fire).

6 *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 at 235, [1955] 3 All ER 864 at 866, HL, per Earl Jowitt, and at 242 and 872 per Lord Radcliffe; *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985, [1985] 1 WLR 1242 (necessary to fire CS gas into building occupied by dangerous intruder but negligent to do so without available fire fighting facilities). See also the Mental Capacity Act 2005 s 5(3).

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### 463. Statutory defences.

A statute may afford particular defences to liabilities it establishes itself or to tort liabilities generally. Examples are the exclusion of liability provided in relation to carriage by sea or air<sup>1</sup> and the exclusion of liability of a hotel proprietor, in his capacity as an innkeeper, towards a guest in relation to loss or damage to vehicles and property left in them<sup>2</sup>.

Where in a private prosecution a person has been summarily convicted for assault or a complaint for assault against him has been heard and dismissed, release from civil proceedings for the same cause is in certain circumstances expressly conferred by statute<sup>3</sup>.

1 See the Carriage by Air Act 1961 s 1(1), Sch 1; the Merchant Shipping Act 1995 ss 185(1), 186, Sch 7 Pt I; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 121 et seq; **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq. Both statutes provide for limited liability in prescribed circumstances.

2 See the Hotel Proprietors Act 1956 s 2(2); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 202.

3 See the Offences against the Person Act 1861 s 45; PARA 540; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1275. See also *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/464. Statutory limits on liability.

#### **464. Statutory limits on liability.**

Rights of limitation of the amount of liability conferred for the benefit of shipowners and others may be pleaded as a defence or made the subject of an action for limitation of liability<sup>1</sup>. There are comparable rights for the benefit of air carriers<sup>2</sup>. Common carriers by land have the benefit of a statutory provision for the limitation of liability in respect of loss of or injury to certain articles carried, in the absence of a declaration of value<sup>3</sup>. A statutory right of limitation of liability conditional on notice being exhibited is conferred in favour of hotel proprietors as innkeepers<sup>4</sup>.

1 See **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 195-197.

2 See eg **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 154 et seq.

3 See **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 669 et seq.

4 See the Hotel Proprietors Act 1956 s 2(3); and **LICENSING AND GAMBLING** vol 67 (2008) PARA 203.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/465. Consent.

#### **465. Consent.**

It is a defence that the claimant consented to acts or omissions which would otherwise have been tortious<sup>1</sup>. Where the claimant freely and with full knowledge exposes himself to the risk of injury or loss from another person's breach of a duty to take reasonable care this is a defence to an action for breach of that duty; the rule is expressed in the maxim *volenti non fit injuria* and rests on to the claimant's voluntary assumption, not merely knowledge, of the risk<sup>2</sup>.

Delay in complaining does not of itself establish a defence of acquiescence in trespass. The other party must have been misled to his or her detriment<sup>3</sup>.

It is not a defence to an action for nuisance that the claimant came to the nuisance<sup>4</sup>.

1 As to trespass to the person see PARA 524 et seq. As to trespass to land see PARA 562 et seq. As to wrongful interference with goods see PARA 600 et seq; and **TORT** vol 45(2) (Reissue) PARA 542 et seq. As to defamation see **LIBEL AND SLANDER**.

2 See **NEGLIGENCE** vol 78 (2010) PARA 69 et seq. For this defence in relation to breach of statutory duty see PARA 513.

3 *Jones v Stones* [1999] 1 WLR 1739, 78 P & CR 293, CA; cf *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, [1981] 1 WLR 1265, CA. See also *Willmott v Barber* (1880) 15 ChD 96; *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co* [1982] QB 133n, [1981] 1 All ER 897, CA.

4 See **NUISANCE** vol 78 (2010) PARA 198.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/466. Contracting out.

#### **466. Contracting out.**

Where parties may lawfully consent they may agree that one or more of them is not to be under liability to the other or others either in particular respects or more generally; however, freedom to contract out of liability in tort has been greatly restricted by statute<sup>1</sup>.

<sup>1</sup> See the Unfair Contract Terms Act 1977; the Road Traffic Act 1988 s 149; and **NEGLIGENCE** vol 78 (2010) PARA 74. See also **CONTRACT**.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/467. Illegality and ex turpi causa.

#### **467. Illegality and ex turpi causa.**

The court may refuse to entertain a claim which would be in breach of public policy as expressed by the maxim *ex turpi causa non oritur actio*<sup>1</sup>. That policy is not based upon a single justification but on a group of reasons which vary in different circumstances<sup>2</sup>. A person participating in a criminal enterprise may be barred from recovery in respect of harm resulting directly from the illegal activity<sup>3</sup>. A civil court will not award damages to compensate a claimant for loss which flows from his deprivation of liberty or other punishment which the criminal courts have imposed on him in respect of a criminal act for which he was responsible<sup>4</sup>.

<sup>1</sup> As to criminal acts in general see *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35 (food safety); *Murphy v Culhane* [1977] QB 94, [1976] 3 All ER 533, CA (affray); *Meah v McCreamer (No 2)* [1986] 1 All ER 943, [1985] NLJ Rep 80 (sexual assaults); *Clunis v Camden and Islington Health Authority* [1998] QB 978, [1998] 3 All ER 180, CA (manslaughter); *Vellino v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 1249, [2002] 3 All ER 78, [2002] 1 WLR 218 (injury while attempting to evade arrest); *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 4 All ER 81, (2009) 108 BMLR 205 (manslaughter); *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 4 All ER 431, [2009] 3 WLR 455 (fraud). Cf *Revill v Newbery* [1996] QB 567, [1996] 1 All ER 291, CA. As to joint criminal ventures see the text and note 3. As to the award of damages in respect of criminal income see *Burns v Edman* [1970] 2 QB 541, [1970] 1 All ER 886 (robber's widow); cf *Hewison v Meridian Shipping Services Pte Ltd* [2002] EWCA Civ 1821, [2003] ICR 766; *Major v Ministry of Defence* [2003] EWCA Civ 1433, (2003) 147 Sol Jo LB 1206 (both obtaining employment by deception, but with different legal results). Cf *Gray v Barr* [1971] 2 QB 554, [1971] 2 All ER 949, CA (effect of illegality on insurance). As to the rights created by illegal transactions see *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL.

The fact that the claimant is a trespasser does not bar recovery: *Westwood v Post Office* [1974] AC 1, [1973] 3 All ER 184, HL. See also the Occupiers' Liability Act 1984.

The maxim *ex turpi causa* does not apply to losses resulting from a person's suicide in consequence of the defendant's breach of a duty of care: *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283, [1990] 3 All ER 246, CA; and see also *Reeves v Metropolitan Police Comr* [2000] 1 AC 360, [1999] 3 All ER 897, HL. Cf *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] 1 AC 884, [2008] 2 All ER 943 (suicide in consequence of tortiously-caused depression).

The public conscience test adopted in some authorities (eg *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116 at 1127, CA) was criticised as hard to employ in *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA, and stated to be of no application in determining the rights created by illegal transactions in *Tinsley v Milligan* [1994] 1 AC 340, [1993] 3 All ER 65, HL. Cf *Gray v Thames Trains Ltd* [2009] UKHL 33 at [51], [2009] 4 All ER 81 at [51], (2009) 108 BMLR 205 at [51] per Lord Hoffmann, stating that the principle against liability for losses caused by the victim's criminal conduct was justified on the ground that it is offensive to public notions of the fair distribution of resources.

The maxim *ex turpi causa* bars a company's claim to recover damages for losses caused by a fraud perpetrated by the person representing its directing mind and will, at least in the case of a one-person company: *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39, [2009] 4 All ER 431, [2009] 3 WLR 455.

2 *Gray v Thames Trains Ltd* [2009] UKHL 33 at [30], [2009] 4 All ER 81 at [30], (2009) 108 BMLR 205 at [30] per Lord Hoffmann; cited with approval in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39 at [25], [2009] 4 All ER 431 at [25] per Lord Phillips of Worth Matravers.

3 *National Coal Board v England* [1954] AC 403 at 429, [1954] 1 All ER 546 at 558, HL, per Lord Asquith of Bishopstone; *Ashton v Turner* [1981] QB 137, [1980] 3 All ER 870 (accident in getaway car); *Pitts v Hunt* [1991] 1 QB 24, [1990] 3 All ER 344, CA (encouragement of grossly dangerous motor cycling). Cf *Burrows v Rhodes* [1899] 1 QB 816 (misrepresentation that act was lawful excluded *ex turpi causa*); *Lane v Holloway* [1968] 1 QB 379, [1967] 3 All ER 129, CA (gross inequality of strength in a fight excluded *ex turpi causa*).

4 *Askey v Golden Wine Co Ltd* [1948] 2 All ER 35; *Clunis v Camden and Islington Health Authority* [1998] QB 978, [1998] 3 All ER 180, CA; *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 4 All ER 81, (2009) 108 BMLR 205. The decision to the contrary of Woolf J in *Meah v McCremer* [1985] 1 All ER 367 cannot be regarded as authoritative.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/468. Inevitable accident.

#### 468. Inevitable accident.

Inevitable accident no longer exists as a separate defence. A person is not liable in negligence unless the claimant proves that he failed to take reasonable care<sup>1</sup>. In trespass, too, it now seems that the claimant fails unless he proves that the defendant either intentionally or negligently committed the wrongful act<sup>2</sup>. Where the tort is one of strict or absolute liability, it is no defence for the defendant to prove inevitable accident<sup>3</sup>.

1 See **NEGLIGENCE** vol 78 (2010) PARA 62 et seq.

2 See eg PARA 572. Even negligence may be insufficient: see PARA 524.

3 See eg **NUISANCE** vol 78 (2010) PARA 148.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(6) DEFENCES/469. Act of God.

#### 469. Act of God.

Where an injury results from natural causes which could not have been foreseen and could not have been avoided by any amount of foresight and care which could reasonably have been expected, it may be said to result from an act of God<sup>1</sup>. Thus in one sense it is merely a type of inevitable accident, and so relied on mainly in order to rebut an allegation of negligence<sup>2</sup>, but its particular quality is that it affords a defence to common law torts involving strict or absolute liability<sup>3</sup>.

1 An act of God is 'something in opposition to the act of man': *Forward v Pittard* (1785) 1 Term Rep 27 at 33 per Lord Mansfield CJ. For other examples see *Keighley's Case* (1609) 10 Co Rep 139a at 139b; *R v Leicestershire Justices* (1850) 15 QB 88 (death of another person); *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781 (extraordinary frost); *Briddon v Great Northern Ry Co* (1858) 28 LJ Ex 51 (snowfall); *Cuckson v Stones* (1858) 1 E & E 248 at 256; *Carstairs v Taylor* (1871) LR 6 Exch 217 (leak caused by rat); *Thomas v Birmingham Canal Co* (1879) 49 LQB 851, DC; *Dixon v Metropolitan Board of Works* (1881) 7 QBD 418 at 421-

422 per Lord Coleridge CJ; *Fobbing Sewers Comrs v R* (1886) 11 App Cas 449, HL; *Re Bird, Bird v Cross* (1894) 8 R 326 (onset of mental disorder). Cf *Dale v Hall* (1750) 1 Wils 281; *Oakley v Portsmouth and Ryde Steam Packet Co* (1856) 11 Exch 618 (strong tide); *Fenwick v Schmalz* (1868) LR 3 CP 313 at 316 (ordinary snowfall); *Liver Alkali Co v Johnson* (1874) LR 9 Exch 338 (fog); *Hamilton, Fraser & Co v Pandorf & Co* (1887) 12 App Cas 518, HL (rats on boat); *Greenock Corpn v Caledonian Rly Co* [1917] AC 556, HL (rain); *Cushing v Peter Walker & Son (Warrington & Burton) Ltd* [1941] 2 All ER 693 at 695 per Hallett J (gale); *Greenwood Tileries Ltd v Clapson* [1937] 1 All ER 765 at 772 per Branson J (high tide). An act of God does not rebut an allegation of negligence where it was itself the result of negligence: *Lords Bailiff-Jurats of Romney Marsh v The Corpn of the Trinity House* (1872) LR 7 Exch 247.

2 As to inevitable accident see PARA 468.

3 *Nichols v Marsland* (1876) 2 ExD 1, CA (distinguished by *Greenock Corpn v Caledonian Rly Co* [1917] AC 556, HL). See also **NUISANCE** vol 78 (2010) PARA 152.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(i) Damages/470. Recovery of damages and interest.

## (7) REMEDIES

### (i) Damages

#### 470. Recovery of damages and interest.

The ordinary remedy for tortious injury is a claim for damages<sup>1</sup>.

In proceedings for the recovery of damages the High Court or a county court has a discretion to award simple interest on the damages in respect of which judgment is given or payment is made before judgment<sup>2</sup>. Interest is at such rate as the court thinks fit or as rules of court provide on all or any part of the damages for all or any part of the period between the date when the cause of action arose and the date of the judgment or, in the case of any sum paid before judgment, the date of the payment<sup>3</sup>.

Where judgment is given for damages for personal injuries<sup>4</sup> or death which exceed £200, the High Court or a county court is required to award interest unless it is satisfied that there are special reasons to the contrary<sup>5</sup>.

Similar provisions require other courts of record to award interest on damages for personal injuries or death which exceed £200, but this duty and the discretion of such courts to award interest in other cases is only in respect of damages for which judgment has been given<sup>6</sup>, not damages for which payment is made before judgment<sup>7</sup>.

1 See **DAMAGES** vol 12(1) (Reissue) PARA 851 et seq.

2 See the Senior Courts Act 1981 s 35A(1) (s 35A added by the Administration of Justice Act 1982 s 15(1), Sch 1 Pt I); the County Courts Act 1984 s 69(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(2)); and **DAMAGES** vol 12(1) (Reissue) PARAS 848-850. See also **CIVIL PROCEDURE**. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.

3 See the Senior Courts Act 1981 s 35A(1) (as added: see note 2); the County Courts Act 1984 s 69(1); and **DAMAGES** vol 12(1) (Reissue) PARA 848. See also **CIVIL PROCEDURE**. The Arbitration Act 1996 gives arbitrators the power, subject to contrary agreement, to award simple or compound interest, from the date of the award or later date, until payment: see s 49(4); and **ARBITRATION** vol 2 (2008) PARA 1260. Interest on damages for pain, suffering and loss of amenities should be awarded from the date of the service of the claim form rather than the date when the cause of action arose: *Jefford v Gee* [1970] 2 QE 130, [1970] 1 All ER 1202, CA. Equity may also use compound interest in requiring a fiduciary to account: *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA.

4 'Personal injuries' includes any disease and any impairment of a person's physical or mental condition: see the Senior Courts Act 1981 s 35A(7) (as added: see note 2); and the County Courts Act 1984 s 69(6). As to damages for personal injuries see **DAMAGES** vol 12(1) (Reissue) PARA 878 et seq.

5 See the Senior Courts Act 1981 s 35A(2) (as added: see note 2), modifying s 35A(1); and the County Courts Act 1984 s 69(2), modifying s 69(1); and **DAMAGES** vol 12(1) (Reissue) PARA 848.

6 See the Law Reform (Miscellaneous Provisions) Act 1934 s 3(1), (1A) (s 3(1A) added by the Administration of Justice Act 1969 s 22). The Law Reform (Miscellaneous Provisions) Act 1934 s is repealed in relation to the High Court and county courts by the Administration of Justice Act 1982 s 15(4), (5).

7 Cf the text to note 2.

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#### **471. Duty to minimise damage.**

There is a duty upon those who have been tortiously injured to mitigate their loss. They are under an obligation to take all reasonable steps to minimise the resulting damage and, in so far as they would have succeeded in so doing, the tortfeasor is relieved of the obligation to compensate them<sup>1</sup>. Where a person, acting reasonably after suffering a tortious injury, so conducts himself as undesignedly to aggravate his damage, such additional loss is recoverable from the tortfeasor<sup>2</sup>.

1 See *Jones v Watney, Combe, Reid & Co Ltd* (1912) 28 TLR 399; and **DAMAGES** vol 12(1) (Reissue) PARA 1041 et seq. See also **DAMAGES** vol 12(1) (Reissue) PARA 859. The burden is on the defendant to prove that the claimant has failed to take reasonable steps to mitigate his loss: *Geest plc v Lansiquot* [2002] UKPC 48, [2003] 1 All ER 383, [2002] 1 WLR 3111 (disapproving *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, [1983] 1 WLR 585, PC); *LE Jones (Insurance Brokers) Ltd v Portsmouth City Council* [2002] EWCA Civ 1723, [2003] 1 WLR 427, (2002) 87 ConLR 169.

2 *Wilson v United Counties Bank Ltd* [1920] AC 102 at 125, HL, per Lord Atkinson; *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006; *Pigney v Pointers Transport Services* [1957] 2 All ER 807, [1957] 1 WLR 1121; *The City of Lincoln* (1889) 15 PD 15, CA; but cf *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, HL. As to medical treatment see *McAuley v London Transport Executive* [1957] 2 Lloyd's Rep 500, CA; *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, [1983] 1 WLR 585, PC (which, it is submitted, appears wrong in placing the burden of proof of reasonableness on the plaintiff: see *Geest plc v Lansiquot* [2002] UKPC 48, [2003] 1 All ER 383, [2002] 1 WLR 3111; and note 1). See also *Roper v Johnson* (1873) LR 8 CP 167. See **DAMAGES** vol 12(1) (Reissue) PARAS 856, 1041 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(i) Damages/472. Election to sue for money had and received.

#### **472. Election to sue for money had and received.**

Where a claimant has the choice of suing in tort or bringing a claim in restitution, if he elects to sue in restitution and signs judgment he cannot thereafter pursue his claim in tort<sup>1</sup>. The most common illustration is where the defendant wrongfully takes the claimant's goods and sells them, and the claimant, instead of suing for wrongful interference with his goods, obtains judgment in restitution for the price received by the defendant<sup>2</sup>.

1 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL. See **RESTITUTION** vol 40(1) (2007 Reissue) PARA 163. See also *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514, [1996] 1 All ER 193, PC; *Island Records Ltd v Tring International plc* [1995] 3 All ER 444, [1996] 1 WLR 1256.

2 See *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL. As to wrongful interference with goods see PARA 600 et seq; and **TORT** vol 45(2) (Reissue) PARA 542 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(i) Damages/473. Tort damages in light of Convention rights.

#### **473. Tort damages in light of Convention rights.**

The remedy available for a tortious act may not infringe rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)<sup>1</sup>. Thus damages for a tortious act may be reduced where they have initially been set at such a high level as to threaten the principle of respect for freedom of expression guaranteed by the Convention<sup>2</sup>.

1 I.e. the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). See further PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 103 et seq.

2 *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670, [1993] 4 All ER 975, CA; *John v MGN Ltd* [1997] QB 586, [1996] 2 All ER 35, CA. See further **LIBEL AND SLANDER**. As to the right to freedom of expression see the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 10(1); and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARAS 158-159.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(i) Damages/474. Recovery without civil proceedings.

#### **474. Recovery without civil proceedings.**

A person who has suffered loss or damage may sometimes be able to obtain compensation or recover money or property without resorting to civil proceedings, whether in tort or otherwise<sup>1</sup>. A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (a 'compensation order') requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence, or to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road<sup>2</sup>. A person who has suffered personal injury may also be eligible for a payment under the Criminal Injuries Compensation Scheme<sup>3</sup>. An owner of property which has come into the possession of the police in connection with their investigation of a suspected offence, or because it has been used for purposes of crime, may apply to a magistrates' court for an order for the delivery of the property to him<sup>4</sup>. Where goods have been stolen, the court by or before which the offender is convicted may on the conviction order them to be restored to any person entitled to recover them from him or pay to such person a sum not exceeding the value of the stolen goods<sup>5</sup>.

1 Indeed, the claimant may have no cause of action against the person ordered to pay compensation: *R v Chappell* (1985) 80 Cr App Rep 31, 6 Cr App Rep (S) 214, CA (where any civil claim by HM Customs and Excise in respect of VAT would have lain only against the offender's company). See also *Issa v Hackney London*

*Borough Council* [1997] 1 All ER 999, [1997] 1 WLR 956, CA (compensation order where no other remedy for statutory nuisance).

2 See the Powers of Criminal Courts (Sentencing) Act 2000 s 130 et seq; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 375 et seq. See also PARA 403.

3 See the Criminal Injuries Compensation Act 1995; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq. See also PARA 403.

4 See the Police (Property) Act 1897 s 1; the Powers of Criminal Courts (Sentencing) Act 2000 ss 143-144; **POLICE** vol 36(1) (2007 Reissue) PARA 520; and **TORT** vol 45(2) (Reissue) PARA 565.

5 See the Powers of Criminal Courts (Sentencing) Act 2000 s 148; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 388; **TORT** vol 45(2) (Reissue) PARA 565.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(ii) Injunctions/475. Injunctions.

## (ii) Injunctions

### 475. Injunctions.

There is a discretion in the High Court or a county court to grant injunctions<sup>1</sup> compelling persons to do<sup>2</sup> or restraining them from doing<sup>3</sup> acts where otherwise the claimant will suffer, or continue to suffer, wrongful injury for which an award of damages will not adequately compensate him<sup>4</sup>. A restrictive (or prohibitory) injunction<sup>5</sup> may be perpetual or of an interim character<sup>6</sup> and may be granted where injury has already been caused and will otherwise continue, or where it has not yet been caused but is imminently threatened<sup>7</sup>. The court has jurisdiction to award damages either in addition to or in substitution for an injunction and even where the injury is only threatened<sup>8</sup>.

1 As to the jurisdiction to grant injunctions see **CIVIL PROCEDURE** vol 11 (2009) PARA 340 et seq.

2 As to mandatory injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 376 et seq.

3 As to restrictive injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 356 et seq.

4 See **CIVIL PROCEDURE** vol 11 (2009) PARA 356.

5 Although a mandatory injunction may be granted by way of interim relief, it is less readily granted before the action is determined: **CIVIL PROCEDURE** vol 11 (2009) PARA 378.

6 As to interim injunctions generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 383 et seq.

7 As to injunctions in respect of threatened injury see **CIVIL PROCEDURE** vol 11 (2009) PARA 384.

8 See **CIVIL PROCEDURE** vol 11 (2009) PARA 364 et seq. See also **DAMAGES** vol 12(1) (Reissue) PARAS 1123, 1126.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(iii) Self-redress/476. Self-help.

## (iii) Self-redress

### 476. Self-help.



In certain cases the law recognises a right to redress for wrongs done without having recourse to the courts; rights to use force within the limits allowed for the defence of persons or of property or to take steps for the protection of property are rights of self-help, but are also of the nature of defences against wrongs in course of commission, and are discussed elsewhere<sup>1</sup>. There is a right of redress for trespass by encroachment on property, the occupier wronged being entitled at common law to remove the encroachment, but, other than in similar simple cases that do not justify the expense of legal proceedings, self-redress in respect of trespass to land is appropriate only in urgent cases which require an immediate remedy<sup>2</sup>. However, the right to retake chattels from a person who has wrongfully taken possession of them generally justifies any assault incidental to the retaking, provided no more force is used than is necessary<sup>3</sup>. It may also be noted that trespassing animals may be detained to secure compensation for damage done by them<sup>4</sup>.

1 See PARAS 460-461. For the defence of necessity see PARAS 459, 468.

2 See *Burton v Winters* [1993] 3 All ER 847 at 851-852, [1993] 1 WLR 1077 at 1081-1082, CA, per Lloyd LJ. It seems therefore no longer to be the case that, if a stranger erects by way of trespass a building on the land of another, the latter is entitled to pull it down in ejecting the intruder: *Burling v Read* (1850) 11 QB 904. As to the expulsion of trespassers see PARA 586. For the restrictions on entry by force see PARA 587.

3 *R v Milton* (1827) Mood & M 107; *Blades v Higgs* (1865) 11 HL Cas 621. See also **TORT** vol 45(2) (Reissue) PARA 670.

4 See the Animals Act 1971 s 7; and **ANIMALS** vol 2 (2008) PARAS 758-759.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(7) REMEDIES/(iii) Self-redress/477. Abatement of nuisances.

#### **477. Abatement of nuisances.**

Although the remedy of abatement of a private nuisance is not one which is favoured by the law<sup>1</sup>, a person who is damaged by a private nuisance is, in general, entitled to abate it, and for this purpose to enter after notice (except in emergency)<sup>2</sup> on the land of another person, provided that a breach of the peace is not caused<sup>3</sup>. Highway authorities have a like common law right, and by statute have other remedies<sup>4</sup>. The right of abatement extends to public nuisances, but some damage to the individual abating it over and above that caused to other members of the public must be shown<sup>5</sup>.

A person entitled to the benefit of a private right of way may abate a nuisance arising from its obstruction and, in general, a dominant owner may abate interference with his easement and for that purpose may enter on the servient tenement<sup>6</sup>.

1 *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* [1927] AC 226, HL: see **NUISANCE** vol 78 (2010) PARA 214.

2 See **NUISANCE** vol 78 (2010) PARA 218.

3 As to abatement see **NUISANCE** vol 78 (2010) PARA 214 et seq.

4 See **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 340 et seq.

5 See **NUISANCE** vol 78 (2010) PARA 216.

6 See **EASEMENTS AND PROFITS A PRENDRE**.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(8) EXTINCTION OF LIABILITY/(i) Limitation of Actions/478. In general.

## **(8) EXTINCTION OF LIABILITY**

### **(i) Limitation of Actions**

#### **478. In general.**

The law relating to the limitation of actions has been consolidated in the Limitation Act 1980<sup>1</sup>, which provides that in general an action founded on tort may not be brought after the expiration of six years from the date on which the cause of action accrued<sup>2</sup>. To this there is the important exception of actions in respect of personal injuries, for which a time limit of three years is normally prescribed<sup>3</sup>, and actions brought in defamation and malicious falsehood, for which a time limit of one year is normally prescribed<sup>4</sup>.

1 See **LIMITATION PERIODS**.

2 See the Limitation Act 1980 s 2; and **LIMITATION PERIODS** vol 68 (2008) PARA 979 et seq. As to when a cause of action accrues see PARA 479. As to exceptions to the six-year limitation period see PARA 480 et seq.

3 See PARA 481 et seq.

4 See the Limitation Act 1980 ss 4A, 32A; and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 167. Special rules also apply to tort claims in respect of successive conversions (s 3), theft (s 4) and actions in respect of defective products (s 11A).

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(8) EXTINCTION OF LIABILITY/(i) Limitation of Actions/479. When a cause of action accrues.

#### **479. When a cause of action accrues.**

Other than in cases of personal injuries, the limitation period generally runs from when the cause of action accrues<sup>1</sup>. In respect of those torts which are actionable without proof of damage, such as trespass and libel, the cause of action accrues, and the period of limitation therefore generally runs, from the date of the tortious act<sup>2</sup>. Where the tort is committed only if damage is proved, for example negligence, the cause of action accrues from the date of the damage<sup>3</sup>.

1 As to the alternative limitation period for a claim in negligence relating to latent damage see PARA 480.

2 See **LIMITATION PERIODS** vol 68 (2008) PARAS 993-997. As to where a right of action is concealed by fraud see **LIMITATION PERIODS** vol 68 (2008) PARA 1220 et seq.

3 See *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, [1983] 1 All ER 65, HL; and **LIMITATION PERIODS** vol 68 (2008) PARA 980 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(8) EXTINCTION OF LIABILITY/(i) Limitation of Actions/480. Alternative limitation period in negligence for latent damage.

#### **480. Alternative limitation period in negligence for latent damage.**

In a negligence action where facts relevant to the cause of action are not known at the date of its accrual, an alternative three-year limitation period<sup>1</sup> runs from the earliest date on which the claimant or any person in whom the cause of action was vested before him first had both the knowledge<sup>2</sup> required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the normal six-year limitation period<sup>3</sup>. In negligence actions not involving personal injuries, an overriding time limit of 15 years from the date of the negligence applies<sup>4</sup>.

1 See the Limitation Act 1980 s 14A (added by the Latent Damage Act 1986 s 1); and **LIMITATION PERIODS** vol 68 (2008) PARA 982. The special time limit given in such cases is confined to actions claiming damages for negligence where the duty of care the breach of which constitutes the negligence relied on arises in tort, and does not apply to claims framed in contract: *Société Commerciale de Réassurance v ERAS (International) Ltd, Re ERAS EIL appeals* [1992] 2 All ER 82n, [1992] 1 Lloyd's Rep 570, CA.

2 'Knowledge' includes knowledge which the person might reasonably have been expected to acquire from (inter alia) facts observable or ascertainable by him: Limitation Act 1980 s 14A(10) (as added: see note 1). As to the knowledge necessary to start time running against a claimant see further *Haward v Fawcetts (a firm)* [2006] UKHL 9, [2006] 3 All ER 497, [2006] 1 WLR 682; and **LIMITATION PERIODS** vol 68 (2008) PARA 982.

3 See **LIMITATION PERIODS** vol 68 (2008) PARA 982.

4 See the Limitation Act 1980 s 14B (added by the Latent Damage Act 1986 s 1).

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#### **481. Limitation of personal injury actions.**

Any action for damages for negligence, nuisance or breach of duty (including trespass to the person<sup>1</sup>), where the damages claimed by the claimant for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the claimant or any other person, may not be brought after the expiration of a specified period<sup>2</sup>. The period is three years from the date on which the cause of action accrued, or the date of knowledge<sup>3</sup>, if later, of the person injured<sup>4</sup>. However, where the person injured dies before the expiration of that period, the period specified as respects the cause of action surviving for the benefit of the deceased's estate is three years from the date of death or the date of the knowledge of the personal representative, whichever is the later<sup>5</sup>.

The special time limit for actions in respect of personal injuries does not apply to any action brought for damages under the Protection from Harassment Act 1997<sup>6</sup>.

1 *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA; *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, [2008] 2 All ER 1, departing from *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322, HL.

2 See the Limitation Act 1980 s 11(1), (2); and **LIMITATION PERIODS** vol 68 (2008) PARA 998 et seq.

3 As to the meaning of 'date of knowledge' see the Limitation Act 1980 s 14; and **LIMITATION PERIODS** vol 68 (2008) PARA 999. See also *Simpson v Norwest Holst (Southern) Ltd* [1980] 2 All ER 471, [1980] 1 WLR 968;

*Halford v Brookes* [1991] 3 All ER 559, [1991] 1 WLR 428, CA; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76, [2004] 3 All ER 897; *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, [2008] 2 All ER 1.

4 See the Limitation Act 1980 s 11(4); and see **LIMITATION PERIODS** vol 68 (2008) PARA 998.

5 See the Limitation Act 1980 s 11(5); and see **LIMITATION PERIODS** vol 68 (2008) PARA 998.

6 lie under the Protection from Harassment Act 1997 s 3 (see PARA 557); see the Limitation Act 1980 s 11(1A) (added by the Protection from Harassment Act 1997 s 6).

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#### **482. Claims under the Fatal Accidents Act 1976.**

An action under the Fatal Accidents Act 1976<sup>1</sup> may not be brought if the death occurred when the person injured could no longer maintain an action and recover damages in respect of the injury, whether because of a time limit in the Limitation Act 1980 or in any other Act, or for any other reason<sup>2</sup>. The action may not be brought after the expiration of three years from the date of death, or the date of knowledge<sup>3</sup> of the person for whose benefit the action is brought, whichever is the later<sup>4</sup>.

1 See PARA 488; and **NEGLIGENCE** vol 78 (2010) PARA 25 et seq.

2 See the Limitation Act 1980 s 12(1) (amended by the Consumer Protection Act 1987 s 6, Sch 1 Pt I para 2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1000.

3 As to the meaning of 'date of knowledge' see the Limitation Act 1980 s 14; and **LIMITATION PERIODS** vol 68 (2008) PARA 999.

4 See the Limitation Act 1980 s 12(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1000.

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#### **483. Court's power to override time limits.**

If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which:

- 14 (1) the provisions in respect of the special time limit for personal injury actions<sup>1</sup> or actions under the Fatal Accidents Act 1976<sup>2</sup> prejudice the claimant or any person whom he represents<sup>3</sup>; and
- 15 (2) any decision of the court would prejudice the defendant or any person whom he represents<sup>4</sup>,

the court may direct that those provisions are not to apply to the action or are not to apply to any specified cause of action to which the action relates<sup>5</sup>. This power extends to actions in respect of defective products<sup>6</sup> except where the damages claimed by the claimant are confined to damages for loss of or damage to property<sup>7</sup>, but does not allow the court to exclude the

overriding time limit of ten years from the time the defendant supplied the product to another (or other relevant time)<sup>8</sup>.

1 See PARA 481.

2 See PARA 482.

3 See the Limitation Act 1980 s 33(1)(a) (amended by the Consumer Protection Act 1987 s 6, Sch 1 Pt I para 6); and **LIMITATION PERIODS** vol 68 (2008) PARA 1001.

4 See the Limitation Act 1980 s 33(1)(b); and **LIMITATION PERIODS** vol 68 (2008) PARA 1001.

5 See the Limitation Act 1980 s 33(1) (as amended: see note 3); and **LIMITATION PERIODS** vol 68 (2008) PARA 1001. For the circumstances to which the court must have regard in exercising its discretion see s 33(3), (4); and **LIMITATION PERIODS** vol 68 (2008) PARA 1002. The court has a broad and unfettered discretion which should not be confined to exceptional cases: *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307, [2006] 3 All ER 1177. See also *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756, [1977] 1 WLR 1073, CA; *Firman v Ellis* [1978] QB 886, [1978] 2 All ER 851, CA; *Simpson v Norwest Holst Southern Ltd* [1980] 2 All ER 471, [1980] 1 WLR 968; *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 2 All ER 296, [1981] 1 WLR 744, HL; *Halford v Brookes* [1991] 3 All ER 559, [1991] 1 WLR 428, CA; *Coad v Cornwall and Scilly Isles Health Authority* [1997] 1 WLR 189, [1997] 8 Med LR 154, CA; *Adams v Bracknell Forest Borough Council* [2004] UKHL 29, [2005] 1 AC 76, [2004] 3 All ER 897; *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, [2008] 2 All ER 1 at [52] per Lord Hoffmann, and at [84]-[89] per Lord Brown of Eaton-under-Heywood; *Cain v Francis* [2008] EWCA Civ 1451, [2009] 2 All ER 579, [2009] 3 WLR 551; *AB v Nugent Care Society* [2009] EWCA Civ 827, [2009] Fam Law 1045, (2009) 153(30) Sol Jo LB 28.

6 In actions for damages by virtue of any provision of the Consumer Protection Act 1987 Pt I (ss 1-9) (see the Limitation Act 1980 s 11A (added by the Consumer Protection Act 1987 Sch 1 Pt I para 1)). Discretionary exclusion of the time limit in respect of such actions is allowed by the Limitation Act 1980 s 33(1).

7 See the Limitation Act 1980 s 33(1A)(b) (s 33(1A) added by the Consumer Protection Act 1987 Sch 1 Pt I para 6).

8 See the Limitation Act 1980 ss 11A(3), 33(1A)(a) (as added: see notes 6, 7 respectively). As to the meaning of 'relevant time' see the Consumer Protection Act 1987 s 4(2); and **LIMITATION PERIODS** vol 68 (2008) PARA 1003.

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## (ii) Waiver and Release

### 484. Waiver.

Waiver is the abandonment of a right, and thus is a defence against its subsequent enforcement<sup>1</sup>. Waiver may be by way of release by deed or accord and satisfaction<sup>2</sup>. The phrase 'waiver of tort' is also sometimes used to describe the claimant's election to seek restitution rather than pursuing his claim in tort: having done so, he cannot then seek damages for the tort<sup>3</sup>. Alternatively, where there is knowledge of the right, a waiver may be implied from conduct which is inconsistent with the continuance of the right, provided the other party is thereby induced to act to his detriment<sup>4</sup>. A deliberate election not to insist on full rights, although made without first obtaining full disclosure of material facts, and to come to a settlement on that basis, will be binding<sup>5</sup>.

1 *Banning v Wright* [1972] 2 All ER 987 at 998, [1972] 1 WLR 972 at 979, HL, per Lord Hailsham LC. See also **EQUITY** vol 16(2) (Reissue) PARA 907. If the cause of action is not extinguished so that is not a waiver in the sense meant here.

2 See PARA 485.

3 *Brewer v Sparrow* (1827) 7 B & C 310. Cf *Rice v Reed* [1900] 1 QB 54, CA. See further PARA 472.

4 *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437, [1998] 1 WLR 1749. Cf *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA (lack of knowledge of right). Delay in complaining does not of itself establish a defence of acquiescence in trespass: see *Jones v Stones* [1999] 1 WLR 1739, 78 P & CR 293, CA.

5 See *Law v Law* [1905] 1 Ch 140 at 158, CA, where, on a settlement of an action involving a charge of fraud, full disclosure of assets was not required by the party agreeing the settlement.

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## 485. Release.

A release of a right of action may be by deed or by accord and satisfaction. A release by deed is binding even though there is no consideration<sup>1</sup>; but to constitute accord and satisfaction there must be satisfaction, or the promise of satisfaction, as well as the agreement or accord<sup>2</sup>. The scope of the release is determined according to ordinary rules applicable to the interpretation of contracts and depends on the parties' intentions<sup>3</sup>; whether acceptance of part-payment in respect of the claim entails a full discharge is therefore a question to be addressed on the specific facts of each case<sup>4</sup>. A release may be general or relate to specific claims or heads of claim<sup>5</sup>. A general release is an agreement containing widely drawn general words releasing all claims one party may have against the other out of the matters in dispute<sup>6</sup>. A party may agree to release claims or rights of which he is unaware, at least in a compromise agreement supported by valuable consideration<sup>7</sup>, if appropriate language is used to make plain that that is his intention, but the court will be very slow to infer that he has done so in the absence of clear language<sup>8</sup>. A release may be vitiated by fraud<sup>9</sup>.

In the case of joint torts, the release of one joint tortfeasor discharges the others, unless the claimant reserves his rights against the others; neither a covenant not to sue nor the release of a several tortfeasor liable for the same damage has the same effect<sup>10</sup>. If there are several claimants in respect of a tort affecting their part ownership of property, a release by one, or accord and satisfaction by one, will be good against all unless there is fraud<sup>11</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARAS 1052-1053 (releases); **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 274 (covenant not to sue). For an example of a case in which there was a release of a cause of action in respect of tortious acts see *Phillips v Clagett* (1843) 11 M & W 84.

2 The promise itself of one party may, in a proper case, constitute the satisfaction. As to accord and satisfaction generally see **CONTRACT** vol 9(1) (Reissue) PARA 1043 et seq.

3 See eg *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8 at [8], [2002] 1 AC 251 at [8], [2001] 1 All ER 961 at [8] per Lord Bingham of Cornhill, and at [22] per Lord Nicholls of Birkenhead.

4 See *Day v McLea* (1889) 22 QBD 610, CA; *Neuchatel Asphalte Co Ltd v Barnett* [1957] 1 All ER 362, [1957] 1 WLR 356, CA; *Bell v Galynski and A Kings Loft Extensions* [1974] 2 Lloyd's Rep 13, CA; cf *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and **CONTRACT** vol 9(1) (Reissue) PARA 1044.

5 *Stewart v Great Western Rly Co* (1865) 2 De G J & Sm 319 (accord); *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1, CCR (deed).

6 See eg *Roberts v Eastern Counties Rly Co* (1859) 1 F & F 460. However, acceptance of a settlement from one tortfeasor bars continuance of proceedings against another, whether the liability is joint or several, if the entire sum agreed upon is received and it was intended to be in full satisfaction of the claim: see PARA 449.

7 *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8 at [22], [2002] 1 AC 251 at [22], [2001] 1 All ER 961 at [22] per Lord Nicholls of Birkenhead. Despite the general words, such a release is ordinarily limited to those matters that were specially in the contemplation of the parties at the time: *London and South Western Rly Co v Blackmore* (1870) LR 4 HL 610 at 623 per Lord Westbury; *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8 at [41]-[42], [2002] 1 AC 251 at [41]-[42], [2001] 1 All ER 961 at [41]-[42] per Lord Hoffmann (dissenting on the interpretation of the release on the facts).

8 *Salkeld v Vernon* (1798) 1 Eden 64 at 67-68 per Lord Keeper Henley.

9 *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8 at [9]-[10], [2002] 1 AC 251 at [9]-[10], [2001] 1 All ER 961 at [9]-[10] per Lord Bingham of Cornhill.

10 See PARA 449.

11 *Wallace v Kelsall* (1840) 7 M & W 264; *Phillips v Clagett* (1843) 11 M & W 84.

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### (iii) Judgment

#### 486. Judgment recovered; res judicata.

If judgment<sup>1</sup> is recovered, the cause of action merges in the judgment, a conception which is expressed in the maxim transit in rem judicatam, and accordingly the claimant cannot sue again in respect of the same cause of action: he is estopped<sup>2</sup>. This doctrine affords no bar unless the cause of action is the same and the claimant sues in the same legal capacity in both claims<sup>3</sup>. A comparable estoppel (issue estoppel) arises where, even if there are two causes of action, there has been a decision on the same issue as between the same parties<sup>4</sup>. There is also a broader principle by which the claimant may be estopped from bringing a claim which properly belonged to earlier proceedings and with reasonable diligence might have been brought forward at that time<sup>5</sup>.

Distinct from estoppel in principle, but analogous in result, is the rule that damages are assessed once and for all, as a consequence of which a claimant must sue once only for all his present and future losses from one cause of action and cannot bring successive claims in respect of parts of his losses<sup>6</sup>. However, if the continuance or repetition of a tort gives rise to fresh causes of action, new proceedings may be founded on these<sup>7</sup>.

1 I.e a final judgment: see **CIVIL PROCEDURE**.

2 See generally **CIVIL PROCEDURE** vol 12 (2009) PARA 1190; and *Brunsdon v Humphrey* (1884) 14 QBD 141 at 147-148, CA, per Bowen LJ.

3 See **CIVIL PROCEDURE** vol 12 (2009) PARA 1183. For example, a claim by a person in his personal capacity, or as administrator of a deceased's estate, or as the representative of the deceased's dependants, does not preclude subsequent litigation in the other capacities: *Leggott v Great Northern Rly Co* (1876) 1 QBD 599; *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA. See also *C (A Minor) v Hackney London Borough Council* [1996] 1 All ER 973, [1996] 1 WLR 789, CA.

4 *Marginson v Blackburn Borough Council* [1939] 2 KB 426, [1939] 1 All ER 273, CA.

5 *Henderson v Henderson* (1843) 3 Hare 100 at 115 per Wigram VC; *Talbot v Berkshire County Council* [1994] QB 290, [1993] 4 All ER 9, CA; *Wain v F Sherwood & Sons Transport Ltd* [1999] PIQR P159, (1998) Times, 16 July, CA. This principle seems to have been ignored in some cases (see *Brunsdon v Humphrey* (1884) 14 QBD 141; *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 at 144-145, HL, per Lord Bramwell) which should therefore be treated with care.

6 See **DAMAGES** vol 12(1) (Reissue) PARAS 833-834. See also *Fetter v Beale* (1701) 1 Ld Raym 339; *Brunsdon v Humphrey* (1884) 14 QBD 141 at 148, CA, per Bowen LJ; *Rothwell v Chemical and Insulating Ltd* [2007] UKHL 39 at [14], [2008] 1 AC 281 at [14], [2007] 4 All ER 1047 at [14] per Lord Hoffmann. The general rule is qualified in that provisional awards of damages and variable periodical payment orders may now be made: see the Senior Courts Act 1981 s 32A (added by the Administration of Justice Act 1982 ss 6(1), 73(2)); the Damages Act 1996 s 2 (substituted by the Courts Act 2003 s 100(1), (4)(a)); and the Damages (Variation of Periodical Payments) Order 2005, SI 2005/841 (amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1(2); and by SI 2007/1898). As to the renaming of the Senior Courts Act 1981 see PARA 470 note 2. See also **CIVIL PROCEDURE**.

7 See **DAMAGES** vol 12(1) (Reissue) PARA 834.

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## (iv) Death

### 487. Survival of causes of action on death.

The common law rule that actions in tort do not survive for the benefit of or against the estate of a deceased person has been substantially abolished by statute<sup>1</sup>. On the death of any person all causes of action in tort other than defamation<sup>2</sup> which subsist against him now survive against his estate<sup>3</sup>.

On the death of any person all causes of action in tort other than defamation or a claim for damages for bereavement<sup>4</sup> which vest in him now survive for the benefit of his estate<sup>5</sup>.

1 As to the common law rule see *Rose v Ford* [1937] AC 826 at 841-842, [1937] 3 All ER 359 at 367-368, HL, per Lord Wright.

2 As to defamation see PARAS 558-560; and **LIBEL AND SLANDER**.

3 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1) (amended by the Law Reform (Miscellaneous Provisions) Act 1970 s 7(2), Schedule; and the Administration of Justice Act 1982 s 75(1), Sch 9 Pt I); and **EXECUTORS AND ADMINISTRATORS**.

4 As to claims for damages for bereavement see the Fatal Accidents Act 1976 s 1A; PARA 488; and **NEGLIGENCE** vol 78 (2010) PARAS 25-28.

5 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1), (1A) (s 1(1) as amended (see note 3); s 1(1A) added by the Administration of Justice Act 1982 s 4(1)); and **EXECUTORS AND ADMINISTRATORS**.

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### 488. The Fatal Accidents Act 1976.

Notwithstanding the death of the person injured, a person is liable to a claim for damages at the suit of a personal representative suing on behalf of particular classes of dependant under the Fatal Accidents Act 1976 if the death has been caused by any wrongful act, neglect or default which is such as would have entitled the person injured, had death not ensued, to maintain a claim and recover damages against the person liable in respect of it<sup>1</sup>. Damages are based on the amount of pecuniary benefit which the dependants might reasonably have been



expected to enjoy had the deceased person not been killed<sup>2</sup>. In addition certain classes of dependant are entitled to a fixed sum in respect of damages for bereavement<sup>3</sup>.

1 See the Fatal Accidents Act 1976 ss 1, 2; and **NEGLIGENCE** vol 78 (2010) PARAS 25-28.

2 See **NEGLIGENCE** vol 78 (2010) PARA 25 et seq.

3 See the Fatal Accidents Act 1976 s 1A; and **NEGLIGENCE** vol 78 (2010) PARA 25.

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## **(9) TORTS COMMITTED ABROAD**

### **489. The Rome II Regulation.**

Under the Rome II Regulation<sup>1</sup>, which is directly applicable in English law, the general rule is that the law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur<sup>2</sup>. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence<sup>3</sup> in the same country at the time when the damage occurs, the law of that country applies<sup>4</sup>. Where it is clear from all the circumstances of the case that the tort or delict is manifestly more closely connected with a country other than that indicated by the above, the law of that other country applies<sup>5</sup>. Special provisions govern the law applicable to non-contractual obligations arising out of damage caused by a product<sup>6</sup>, an act of unfair competition or a restriction of free competition<sup>7</sup>, environmental damage<sup>8</sup>, an infringement of intellectual property rights<sup>9</sup>, and an industrial action<sup>10</sup>. Without prejudice to the rights of third parties, the parties may agree to submit non-contractual obligations to the law of their choice, either by an agreement entered into after the event giving rise to the damage occurred, where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred or, where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred<sup>11</sup>. However, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties is not to prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement<sup>12</sup>.

The law applicable to non-contractual obligations under the above provisions governs in particular (1) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (2) the grounds for exemption from liability, any limitation of liability and any division of liability; (3) the existence, the nature and the assessment of damage or the remedy claimed; (4) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; (5) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; (6) persons entitled to compensation for damage sustained personally; (7) liability for the acts of another person; and (8) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation<sup>13</sup>.

In assessing the conduct of the person claimed to be liable, account must be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability<sup>14</sup>. Nothing in the Rome II Regulation restricts the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation<sup>15</sup>. The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides<sup>16</sup>. Provision is also made as to subrogation<sup>17</sup> and multiple liability<sup>18</sup>.

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed<sup>19</sup>. The law governing a non-contractual obligation under the Rome II Regulation applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof<sup>20</sup>. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to above<sup>21</sup> under which that act is formally valid, provided that such mode of proof can be administered by the forum<sup>22</sup>.

These provisions also apply in case of conflicts between the laws of different parts of the United Kingdom<sup>23</sup>.

1     Ie European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) on the law applicable to non-contractual obligations (the 'Rome II Regulation'). See **CONFLICT OF LAWS**.

2     European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 4(1).

3     For the purposes of the Rome II Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, is the place of central administration; and where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located is to be treated as the place of habitual residence: European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 23(1). For the purposes of the Regulation, the habitual residence of a natural person acting in the course of his or her business activity is his or her principal place of business: art 23(2).

4     European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 4(2). The application of the law of any country specified by the Regulation means the application of the rules of law in force in that country other than its rules of private international law, ie renvoi is excluded: art 24.

5     European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 4(3). A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort or delict in question: art 4(3).

6     See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 5; and **SALE OF GOODS AND SUPPLY OF SERVICES**.

7     See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 6; and **COMPETITION**.

8     See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 7; and **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH**.

9     See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 8; and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS; TRADE MARKS AND TRADE NAMES**.

10    See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 9; and **EMPLOYMENT**.

11    European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 14(1). The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case: art 14(1).

12 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 14(2). Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the member states, the parties' choice of the law applicable other than that of a member state is not to prejudice the application of provisions of European Union law, where appropriate as implemented in the member state of the forum, which cannot be derogated from by agreement: art 14(3).

13 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 15. The Regulation departs from previous English law (see *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1, [2006] 4 All ER 1) in treating the assessment of damage as a matter within the scope of the law applicable.

14 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 17.

15 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 16.

16 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 18.

17 See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 19.

18 See European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 20.

19 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 21.

20 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 22(1).

21 le referred to in European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 21: see the text to note 19.

22 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 22(2).

23 European Parliament and EC Council Regulation 864/2007 (OJ L199, 31.7.2007, p 40) art 25; Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, SI 2008/2986, reg 6.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/1. THE GENERAL LAW OF TORT/(9) TORTS COMMITTED ABROAD/490. Where the Rome II Regulation does not apply.

#### **490. Where the Rome II Regulation does not apply.**

By statute<sup>1</sup>, the applicable law for determining issues relating to tort<sup>2</sup> which do not fall to be determined under the provisions of European Union (EU) law<sup>3</sup> is in general the law of the country in which the events constituting the tort in question occur<sup>4</sup>. The statutory provisions apply irrespective of whether the relevant events occur in the forum or in some other country<sup>5</sup>. The general rule may be displaced where it is substantially more appropriate for the applicable law to be that of some other country connected with the tort<sup>6</sup>. The statutory provisions do not in any case apply to affect the determination of issues arising in any defamation claim<sup>7</sup>, which continues to be governed by rules of the common law<sup>8</sup>. The jurisdiction of any court in England and Wales or Northern Ireland to entertain proceedings for trespass to or any other tort affecting immovable property extends to cases in which the property in question is situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property<sup>9</sup>.

1 le the Private International Law (Miscellaneous Provisions) Act 1995 Pt III (ss 9-15), which came into force on 1 May 1996 (see s 16(3); and the Private International Law (Miscellaneous Provisions) Act 1995 (Commencement) Order 1996, SI 1996/995). As to the application of the Private International Law (Miscellaneous Provisions) Act 1995 Pt III to the Crown see s 15; and as to transitional and saving provisions see s 14. See further **CONFLICT OF LAWS**.

2 See the Private International Law (Miscellaneous Provisions) Act 1995 s 9(1), (2); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 368. The applicable law must be used for determining the issues arising in a claim, including

in particular the question whether an actionable tort has occurred: see s 9(4); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 368. The applicable law to be used is to exclude any choice of law rules forming part of the law of the country or countries concerned: see s 9(5); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 368.

3 See the Rome II Regulation (see PARA 489): Private International Law (Miscellaneous Provisions) Act 1995 s 15A(1) (s 15A added by SI 2008/2986). Conflicts solely between the laws of different parts of the United Kingdom fall to be determined under the above provisions of EU law for these purposes: Private International Law (Miscellaneous Provisions) Act 1995 s 15A(2) (as so added).

4 See the Private International Law (Miscellaneous Provisions) Act 1995 s 11(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 369. Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being: (1) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury (s 11(2)(a)); (2) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged (s 11(2)(b)); and (3) in any other case, the law of the country in which the most significant element or elements of those events occurred (s 11(2)(c)). For these purposes, 'personal injury' includes disease or any impairment of physical or mental condition: s 11(3). See further **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 369.

Rules of the common law, in so far as they (a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort is actionable; or (b) allow (as an exception from the rules falling with head (a)) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising from the case in question, are abolished except in relation to the determination of issues arising in any defamation claim: see ss 10, 13; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 368.

In so far as Pt III extends to any country within the United Kingdom, the 'forum' means England and Wales, Scotland or Northern Ireland, as the case may be: see s 9(7). Except where otherwise provided, the provisions of Pt III extend to England and Wales, Scotland and Northern Ireland: see s 18(3) (amended by SI 2008/2986). As to the meaning of 'United Kingdom' see PARA 452 note 3.

5 See the Private International Law (Miscellaneous Provisions) Act 1995 s 9(6); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 368.

6 See the Private International Law (Miscellaneous Provisions) Act 1995 s 12; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 370. As to the meaning of 'substantially more appropriate' see *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [2008] 3 All ER 28.

7 See the Private International Law (Miscellaneous Provisions) Act 1995 ss 9(3), 13(1); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 367. As to the meaning of 'defamation claim' for these purposes see s 13(2); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 377.

8 See the Private International Law (Miscellaneous Provisions) Act 1995 ss 10, 13; note 3; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 368, 377. As to torts not governed by the Private International Law (Miscellaneous Provisions) Act 1995 see **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 373-377.

9 Civil Jurisdiction and Judgments Act 1982 s 30(1), which has effect subject to (1) the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; EC 46 (1978); Cmd 7395) set out in the Civil Jurisdiction and Judgments Act 1982 Sch 1; (2) the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Lugano, 16 September 1988; OJ L319, 25.11.88, p 9) (including the Protocols annexed to that Convention), which was signed by the United Kingdom on 18 September 1989, set out in the Civil Jurisdiction and Judgments Act 1982 Sch 3C; (3) EC Council Regulation 44/2001 (OJ L299, 16.11.2005, p 62) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as applied by the Agreement made on 19 October 2005 between the European Community and the Kingdom of Denmark; and (4) the provisions as to allocation of jurisdiction within the United Kingdom in certain civil proceedings set out in the Civil Jurisdiction and Judgments Act 1982 Sch 4: see s 30(2) (amended by the Civil Jurisdiction and Judgments Act 1991 s 3, Sch 2 para 13; and by SI 2001/3929); and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 65, 392 et seq.

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## 2. GENERAL TORTIOUS LIABILITIES

### (1) NEGLIGENCE

## 491. In general.

Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand<sup>1</sup>. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which it can be reasonably foreseen may cause harm to the claimant's interests in so far as they fall within the scope of the duty<sup>2</sup>. The claimant must prove that the defendant's negligence was a cause of the harm<sup>3</sup>.

A duty of care arises more readily in respect of personal injuries and property damage than in respect of economic loss<sup>4</sup>. Liability in negligence generally arises only in respect of economic losses caused by personal injuries or property damage, and only exceptionally in respect of economic losses not so caused ('pure economic loss')<sup>5</sup>.

Negligence in the sense of the failure in any given circumstances to exercise that care which the circumstances demand may also be an element of certain other torts<sup>6</sup>.

1 See **NEGLIGENCE** vol 78 (2010) PARA 1. See eg *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL.

2 See **NEGLIGENCE** vol 78 (2010) PARA 2 et seq. See also **DAMAGES** vol 12(1) (Reissue) PARAS 854-858.

3 See **NEGLIGENCE** vol 78 (2010) PARA 3.

4 *Murphy v Brentwood District Council* [1991] 1 AC 398 at 487, [1990] 2 All ER 908 at 933, HL, per Lord Oliver of Aylmerton ('something more is required').

5 See **NEGLIGENCE** vol 78 (2010) PARA 13.

6 Eg breach of statutory duty (see PARA 504) and occupiers' liability (see **NEGLIGENCE** vol 78 (2010) PARAS 32, 40). As to negligence in trespass to the person see PARA 524. As to negligence in nuisance see **NUISANCE** vol 78 (2010) PARA 102.

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## (2) INTENTIONAL INJURY

### 492. In general.

There is no specific tort of causing harm intentionally or even maliciously<sup>1</sup>. Liability has to be brought under one of a number of more specific heads<sup>2</sup>. These liabilities for intentional injury receive a degree of special treatment in law.

Generally, torts of intentional injury protect against injury in a wider range of circumstances than torts of negligence, for example in respect of pure economic loss<sup>3</sup> and injuries to personal autonomy not involving physical harm<sup>4</sup>.

The compensation available in respect of torts of intentional injury may also be more extensive than that available in respect of negligence. The tort of deceit<sup>5</sup> attracts a special measure of damages<sup>6</sup> which renders the defendant answerable for all losses flowing directly from the fraudulent statement, whether they were foreseeable or not<sup>7</sup>. A similar measure may follow from other torts which are deliberately committed<sup>8</sup>, such as those forms of conversion which constitute an intentional and malicious interference with another's interest in goods<sup>9</sup>.

A further distinction may be drawn as regards defences. The defendant to a claim in tort for deceit is unable to rely on the defence of contributory negligence<sup>10</sup>, a disability which also

appears to affect those who commit other deliberate torts<sup>11</sup>, though the availability of the defence in claims for assault and battery is not settled<sup>12</sup>.

Vicarious liability<sup>13</sup> may be harder to exact from a tortfeasor's employer in the case of a deliberate tort, largely because of the difficulty of holding that a malicious or dishonest act, committed without the knowledge or authority of the employer, is performed in the course of the employer's employment<sup>14</sup>. Liability for some deliberate torts may be attributable to the employer only where he expressly or impliedly authorised the commission of the tort, or where the employee had ostensible authority to commit it<sup>15</sup>.

A bailee is answerable for a theft or other deliberate wrong committed or connived at by an employee who has been engaged by him only where the bailee entrusted the goods to the employee for the purpose of delegating to him some part of the bailee's duty of care<sup>16</sup>; it is only in such circumstances that the employee is deemed to commit the wrongful act in the course of his employment<sup>17</sup>.

A deliberate and malicious or dishonest tort may attract an award of exemplary damages<sup>18</sup>.

1 In general, no actions which would be legal if done with a proper motive can become illegal because they are prompted by a motive which is improper, selfish or even malicious: see *Mayor of Bradford v Pickles* [1895] AC 587, HL. Actions done in concert may, however, give rise to tortious liability if done with the predominant purpose of causing injury: see PARA 626.

2 For example, intentional interference with the person under the rule in *Wilkinson v Downton* [1897] 2 QB 57 (see PARA 556), intentionally causing loss by unlawful means (see PARA 621), malicious falsehood (see PARA 518), and malicious prosecution (see PARA 627 et seq).

3 See PARA 612 et seq.

4 Trespass to the person is actionable per se: see PARA 524.

5 As to the various states of mind which constitute deceit see *Derry v Peek* (1889) 14 App Cas 337, HL; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 757. As to the tort of deceit see PARA 519; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789 et seq.

6 As to damages under the Misrepresentation Act 1967 s 2 see **DAMAGES** vol 12(1) (Reissue) PARA 1109; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 811.

7 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, HL.

8 *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 278-280, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 790, HL, per Lord Steyn.

9 See PARA 600 et seq; and **TORT** vol 45(2) (Reissue) PARA 542 et seq.

10 See *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2002] UKHL 43, [2003] 1 AC 959, [2003] 1 All ER 173; PARA 519; and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 761. As to contributory negligence see PARA 512; and **DAMAGES** vol 12(1) (Reissue) PARAS 1047-1050; **NEGLIGENCE** vol 78 (2010) PARA 75 et seq.

11 See eg *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd* [1997] 2 All ER 917, [1997] 1 WLR 1396 (in which it was held that the defence of contributory negligence does not apply to a conspiracy claim based on bribery). The defence of contributory negligence does not generally apply to a claim founded on conversion or intentional trespass to goods: see the Torts (Interference with Goods) Act 1977 s 11(1); and **TORT** vol 45(2) (Reissue) PARAS 639, 680.

12 See **DAMAGES** vol 12(1) (Reissue) PARA 876.

13 As to vicarious liability see generally PARA 680 et seq.

14 See *Crédit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [2000] 1 AC 486, [1999] 1 All ER 929, HL. See also *Makanjuola v Metropolitan Police Comr* [1992] 3 All ER 617, [1989] NLJR 468 (police officer). But cf *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122, [2001] 3 All ER 193; *Dubai Aluminium Co Ltd v Salaam*

(*Livingstone, third parties*) [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97; *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] 4 All ER 395. As to the liability of an employer depending on the employee having acted in the course of employment see PARA 692.

15 *Lloyd v Grace Smith & Co* [1912] AC 716, HL. See further PARAS 690-691.

16 *United Africa Co Ltd v Saka Owaode* [1955] AC 130, [1957] 3 All ER 216, PC; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Transmotors Ltd v Robertson Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *Richmond Metal Co Ltd v J Coales & Son Ltd* [1970] 1 Lloyd's Rep 423; *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580, [1978] 3 All ER 337, PC; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] 2 Lloyd's Rep 79; *Metrotex Pty Ltd v Freight Investments Pty Ltd* [1969] VR 9, Vict SC; *Punch v Savoy's Jewellers Ltd* (1986) 26 DLR (4th) 546, Ont CA. See **BAILMENT** vol 3(1) (2005 Reissue) PARA 42.

17 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA. See also *Rustenburg Platinum Mines Ltd, Johnson Matthey (Pty) Ltd and Matthey Bishop Inc v South African Airways and Pan American World Airways Inc* [1979] 1 Lloyd's Rep 19, CA; *Photo Production Ltd v Securicor (Transport) Ltd* [1980] AC 827, [1980] 1 All ER 556, HL; cf *Irving and Irving v Post Office* [1987] IRLR 289, CA.

18 See **DAMAGES** vol 12(1) (Reissue) PARAS 1115-1117.

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### **(3) UNLAWFUL CONDUCT**

#### **(i) In general**

#### **493. Injury by unlawful conduct in general.**

There is no general liability for causing harm by an unlawful act or omission. Causing harm by breach of a statute is actionable only if the provision in question was intended to confer private rights of action on the victim<sup>1</sup>. The torts of assault, battery and false imprisonment are also crimes, and the crime of public nuisance gives rise to tortious liability where a person suffers special damage as a result, but there is no tort of causing harm by criminal conduct<sup>2</sup>. Harm that is the object of a conspiracy to injure by unlawful means is, however, actionable in tort<sup>3</sup>. Nor is there a general principle of tortious liability for harm or loss that is the inevitable consequence of a person's unlawful, intentional and positive acts<sup>4</sup>. However, an unlawful interference with the actions of a person in which the claimant has an economic interest, done with the intention to cause loss to the claimant, may give rise to liability in the tort of causing loss by unlawful means<sup>5</sup>. It remains to be decided whether there is a tort comprising the intentional infliction of physical harm by unlawful means, but if there is such a tort a claim for distress is not actionable upon it<sup>6</sup>.

1 See PARA 495 et seq.

2 See PARA 403. As to assault, battery and false imprisonment see PARA 524 et seq. As to public nuisance see PARA 494.

3 *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174, [2008] 2 All ER 413.

4 See *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173, [1981] 2 All ER 456, HL, declining to follow *Beauresert Shire Council v Smith* (1966) 120 CLR 145, Aust HC.

5 See *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545; and PARA 621.

6 *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370, [2007] QB 846, [2007] 2 WLR 1062.

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## (ii) Public Nuisance

### 494. Public nuisance.

Any person who by any act unwarranted by law or by any omission to perform a legal duty inflicts damage, injury, discomfort or inconvenience on a class<sup>1</sup> of Her Majesty's subjects commits an offence known as a public nuisance<sup>2</sup>. If an individual has suffered some special damage over and above that inflicted on the community at large, he has a right of action in tort for that nuisance<sup>3</sup>. In this context, in contrast with the law of private nuisance<sup>4</sup>, the claimant need not demonstrate any possessory or proprietary interest on his part in land affected by the defendant's act<sup>5</sup>; he may, for example, be a mere user of the highway<sup>6</sup>. In further contrast with the law of private nuisance, damages may be awarded in public nuisance for personal injury and not just for interference with the use of land<sup>7</sup>.

1 *A-G (ex rel Glamorgan County Council and Pontardawe RDC) v PYA Quarries Ltd* [1957] 2 QB 169, [1957] 1 All ER 894, CA.

2 *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459, [2006] 2 All ER 257. See also **NUISANCE** vol 78 (2010) PARAS 105-106. As to closure of premises associated with persistent disorder or nuisance see **CRIMINAL LAW, EVIDENCE AND PROCEDURE**.

3 See **NUISANCE** vol 78 (2010) PARAS 108, 187. See also *Winterbottom v Lord Derby* (1867) LR 2 Exch 316 at 321-322 per Kelly CB.

4 See PARAS 592-593.

5 See eg *Tate & Lyle Industries Ltd v GLC* [1983] 2 AC 509, [1983] 1 All ER 1159, HL (no action in private nuisance, as no private rights of property in river bed; but action in public nuisance sustainable as defendants caused special loss through interference with plaintiffs' public right of navigation).

6 See eg *Holling v Yorkshire Traction Co Ltd* [1948] 2 All ER 662; *Dollman v A & S Hillman Ltd* [1941] 1 All ER 355, CA. Cf *Trevett v Lee* [1955] 1 All ER 406, [1955] 1 WLR 113, CA.

7 *Re Corby Group Litigation* [2008] EWCA Civ 463, [2009] QB 335, [2009] 4 All ER 44.

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## (iii) Breach of Statutory Duty

### A. NATURE OF THE CAUSE OF ACTION

#### 495. Essentials of the cause of action.

Breach of statutory duty is an independent tort recognised at common law<sup>1</sup>. In order to succeed the claimant must establish<sup>2</sup> a breach of a statutory obligation<sup>3</sup> which, on the proper construction of the statute<sup>4</sup>, was intended to confer private rights of action<sup>5</sup> upon a class of persons of whom he is one<sup>6</sup>; he must establish an injury or damage<sup>7</sup> of a kind against which the statute was designed to give protection<sup>8</sup>; and he must establish that the breach of statutory



obligation caused, or materially contributed to, that injury or damage, or (exceptionally) to the risk of that injury or damage<sup>9</sup>.

A defence to such a cause of action may be specially provided by statute<sup>10</sup>. Contributory negligence on the part of the claimant may be established by the defendant as a partial defence<sup>11</sup>. The maxim *volenti non fit injuria*, however, is not generally applicable by way of defence to a claim founded on breach by an employer of his statutory duty<sup>12</sup>.

1 *London Passenger Transport Board v Upson* [1949] AC 155 at 168, [1949] 1 All ER 60 at 67, HL, per Lord Wright. As to the tort of breach of statutory duty see also **STATUTES** vol 44(1) (Reissue) PARA 1360.

2 In the absence of countervailing statutory language (see eg *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, [1967] 3 All ER 187, HL), the onus of proving a breach of duty lies on the claimant in a claim for breach of statutory duty as it does in a claim for negligence at common law: *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620, 624-625, [1956] 1 All ER 615 at 618, 621, HL. See also **NEGLIGENCE** vol 78 (2010) PARA 62. Much of the case law in this field was developed in interpreting the Factories Act 1961, the Coal Mines Act 1911 (repealed) and the Offices, Shops and Railway Premises Act 1963. The relevant provisions of these statutes have been repealed and replaced by regulations enacted under the Health and Safety at Work etc Act 1974 in order to give effect to European Directives: see **HEALTH AND SAFETY AT WORK**. See also **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARAS 510-511. Breach of a duty imposed by health and safety regulations under the Health and Safety at Work etc Act 1974 is actionable except in so far as the regulations provide otherwise: s 47(2) (amended by the Employment Protection Act 1975 ss 116, 125(3), Sch 15 para 14, Sch 18); and see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 416. Though the drafting of the regulations differs from that of the statutes, general principles such as the burden of proof, the need to prove causation and the relevance of membership of a protected class remain valid for breach of statutory duty generally.

3 The violation of rights arising under primary and secondary European Union legislation may ground a claim for, or analogous to, breach of statutory duty: see *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, [1983] 2 All ER 770, HL; *R v Secretary of State for Transport, ex p Factortame Ltd (No 7)* [2001] 1 WLR 942; *Courage Ltd v Crehan (Case C-453/99)* [2002] QB 507, [2001] ECR I-6297, EC; *Sempra Metals Ltd v IRC* [2007] UKHL 34 at [69], [2008] 1 AC 561 at [69], [2007] 4 All ER 657 at [69] per Lord Nicholls of Birkenhead, at [162] per Lord Walker of Gestingthorpe, and at [225] per Lord Mance. The legislation in question must entail the grant of rights to individuals: see *Three Rivers District Council v Bank of England (No 3) (Summary Judgment)* [2001] UKHL 16, [2003] 2 AC 1, [2001] 2 All ER 513; *Poole v HM Treasury* [2007] EWCA Civ 1021, [2008] 1 All ER (Comm) 1132, [2008] Lloyd's Rep IR 134.

4 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407, [1949] 1 All ER 544 at 548, HL, per Viscount Simonds; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson. As to the construction of statutes to ascertain whether a claim may be brought see PARA 498 et seq.

5 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson.

6 See PARA 500.

7 *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2004] 3 All ER 237, [2003] 1 WLR 1763 at [41]-[44] per Lord Hutton, and at [69] per Lord Millett.

8 See PARA 501. As to the measure of damages see PARA 516.

9 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL (material contribution to injury or damage); *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305 (material contribution to risk). See further PARAS 508-509.

10 See PARA 510.

11 See PARA 512.

12 See PARA 513.

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#### **496. Breach of statutory duty distinguished from negligence.**

The civil right of action for breach of statutory duty is a claim in tort arising under the common law but must be distinguished from the cause of action for negligence<sup>1</sup>, including negligence in the exercise of a statutory power<sup>2</sup>. In some cases, the same injury may give rise to both types of liability<sup>3</sup> but this is not invariably the case. A claimant may fail to establish breach of statutory duty but establish liability in negligence, for example, because the common law duty of care goes beyond what is required by the statute<sup>4</sup>. Alternatively, a claimant may establish breach of statutory duty but fail to establish liability in negligence, for example, because the statute was breached without fault<sup>5</sup>. Naturally there are considerable similarities between the two actions where the duty imposed by statute is a duty to take care<sup>6</sup>. Though compliance with statutory safety regulations does not preclude liability for common law negligence<sup>7</sup>, it may be difficult to prove negligence against a defendant who has carried out the provisions of a detailed statutory code applicable to the circumstances in question<sup>8</sup>. Failure to conform with the requirements of statute, on the other hand, does not necessarily constitute negligence<sup>9</sup>, even when it may give rise to a claim for breach of statutory duty, but it may and frequently does amount to prima facie evidence of negligence<sup>10</sup>.

1 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 177-178, [1939] 3 All ER 722 at 738-739, HL, per Lord Wright; *London Passenger Transport Board v Upson* [1949] AC 155 at 168, [1949] 1 All ER 60 at 67, HL, per Lord Wright. As to breach of statutory duty and negligence see also **STATUTES** vol 44(1) (Reissue) PARA 1361.

2 As to the negligent exercise of statutory powers see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 189. See also **NEGLIGENCE** vol 78 (2010) PARAS 17-19.

3 *National Coal Board v England* [1954] AC 403, [1954] 1 All ER 546, HL. Cf *Graham v CE Heinke & Co Ltd* [1959] 1 QB 225, [1958] 3 All ER 650, CA (claims for negligence and breach of statutory duty with payment into court; no need to specify in respect of which claim payments were made as claims were alternative not cumulative). As to payment into court see CPR Pt 36; and **CIVIL PROCEDURE**.

4 See eg *Franklin v Gramophone Co Ltd* [1948] 1 KB 542, [1948] 1 All ER 353, CA; *Nolan v Dental Manufacturing Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936; *Bux v Slough Metals Ltd* [1974] 1 All ER 262, [1973] 1 WLR 1358, CA; *Killgolan v William Cooke & Co Ltd* [1956] 2 All ER 294, [1956] 1 WLR 527, CA; *Quintas v National Smelting Co Ltd* [1961] 1 All ER 630, [1961] 1 WLR 401, CA.

5 See eg *John Summers & Sons Ltd v Frost* [1955] AC 740, [1955] 1 All ER 870, HL; *Kelly v WRN Contracting Ltd* [1968] 1 All ER 369, [1968] 1 WLR 921; and see PARA 504.

6 *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1 at 10, HL, per Lord Atkin, at 18 per Lord Macmillan, and at 23 per Lord Wright; *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 at 88, [1940] 4 All ER 527 at 533, HL, per Lord Atkin.

7 *Franklin v Gramophone Co Ltd* [1948] 1 KB 542, [1948] 1 All ER 353, CA; *Bux v Slough Metals Ltd* [1974] 1 All ER 262, [1973] 1 WLR 1358. See also **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 412-419.

8 *England v National Coal Board* [1953] 1 QB 724 at 731-732, [1953] 1 All ER 1194 at 1198, CA, per Somervell LJ; revsd in part but not on this point sub nom *National Coal Board v England* [1954] AC 403, [1954] 1 All ER 546, HL.

9 See eg *National Coal Board v England* [1954] AC 403 at 421, [1954] 1 All ER 546, HL, per Lord Oaksey.

10 See eg *Blamires v Lancashire and Yorkshire Rly Co* (1873) LR 8 Exch 283, Ex Ch; *Cayzer, Irvine & Co v Carron Co* (1884) 9 App Cas 873 at 880, HL, per Lord Blackburn; *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539 at 548, DC, per McCardie J (affd [1923] 2 KB 832, CA); *Anglo-Newfoundland Development Co Ltd v Pacific Steam Navigation Co* [1924] AC 406 at 413, HL, per Lord Dunedin; *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1 at 13, HL, per Lord Warrington; *Grealis v Opuni* [2003] EWCA Civ 177, [2004] RTR 97,

[2003] All ER (D) 254 (Jan) (breach of speed limit providing evidence of negligence). The Road Traffic Act 1988 s 38(7) expressly provides that the failure on the part of any person to observe a provision of the Highway Code may in any proceedings be relied upon by any party as tending to establish or negative any liability which is in question: see further *Powell v Phillips* [1972] 3 All ER 864 at 867-868, CA, per Stephenson LJ (considering an equivalent provision in earlier legislation); and **ROAD TRAFFIC** vol 40(1) (2007 Reissue) PARA 221.

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#### **497. Breach of statutory duty distinguished from special statutory remedies.**

The common law claim for breach of statutory duty, being based on a cause of action arising at common law, is to be distinguished from such claims as those to recover the penalties<sup>1</sup>, compensation or expenses which are expressly made recoverable by certain statutes<sup>2</sup>, and from cases in which a statute itself expressly confers a right to claim damages<sup>3</sup> or limits<sup>4</sup> or increases<sup>5</sup> the damages which may be recovered in respect of a particular cause of action.

1 See **STATUTES** vol 44(1) (Reissue) PARA 1357.

2 See **DAMAGES** vol 12(1) (Reissue) PARAS 814-815.

3 See eg the Protection from Harassment Act 1997 s 3(1), (2), and PARA 557; the Fatal Accidents Act 1976 s 1, and **NEGLIGENCE** vol 78 (2010) PARA 25 et seq.

4 See eg **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 121 et seq, 154 et seq; **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 549; **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1042 et seq.

5 See eg **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 667-669.

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#### **B. CONSTRUCTION OF STATUTE TO ASCERTAIN WHETHER A CLAIM MAY BE BROUGHT**

##### **498. Matters to be considered.**

Whether or not an individual can bring a common law claim in respect of a breach of a duty imposed by a statute depends upon whether the intention of the statute, considered as a whole and in the circumstances in which it was made and to which it relates, was to impose a duty enforceable by an aggrieved individual<sup>1</sup>. No universal rule can be formulated which will answer the question whether in any given case the statute creates a private right of action<sup>2</sup>. In answering the question it is, however, relevant to consider whether the statute was intended to protect a limited class of persons or the public as a whole<sup>3</sup>, whether a special statutory remedy by way of penalty or otherwise is prescribed for breach of the statute<sup>4</sup>, whether breach of the statute was capable of causing loss or injury of a kind for which the law generally awards damages<sup>5</sup>, the nature of the obligation imposed<sup>6</sup>, and the statute's general aims and objectives<sup>7</sup>. In the case of breach of a statutory instrument or other subordinate legislation, it may be necessary to consider whether the parent enactment contemplated the creation of civil liability by the subordinate legislation<sup>8</sup>.

1 See *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832 at 841-842, CA, per Atkin LJ; *Clarke v Brims* [1947] KB 497 at 504-505, [1947] 1 All ER 242 at 245-246 per Morris J; *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243 at 255, [1954] 2 All ER 625 at 631, CA; per Somervell LJ; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson. The fact that a statutory provision does not refer to private rights when others expressly create them indicates that the former provision was not intended to create them: *Norwich Union Life Insurance Society v Qureshi* [1999] 2 All ER (Comm) 707, [1999] CLC 1963, CA. As to the onus of proof of breach of duty see PARA 495 note 2.

2 See *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the existing law, in which it was enacted: *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407, [1949] 1 All ER 544 at 548, HL, per Lord Simonds. See also *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185-186, [1981] 2 All ER 456 at 461, HL, per Lord Diplock.

3 See PARA 500.

4 See PARA 499.

5 *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, [1991] 1 All ER 622, HL.

6 The absolute nature of the obligation in question may be a factor indicating that the statute was not intended to create private rights of action: see *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832 at 842, CA, per Atkin LJ; *Tan Chye Choo v Chong Kew Moi* [1970] 1 All ER 266 at 272, [1970] 1 WLR 147 at 154, PC, per Lord Morris of Borth-y-Gest; *Todd v Adam* [2002] EWCA Civ 509 at [29], [2002] 2 All ER (Comm) 97 at [29], [2002] 2 Lloyd's Rep 293 at [29] per Neuberger J. Other factors indicating that the statute was not intended to create private rights of action include the procedural nature of the obligation (*Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, [1989] 1 All ER 1025, CA) and the discretion involved in its performance (*X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 732, [1995] 3 All ER 353 at 365, HL, per Lord Browne-Wilkinson). As to obligations imposed on local authorities see PARA 502.

7 Regulatory or welfare legislation does not normally confer private rights of action: *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731-732, [1995] 3 All ER 353 at 364-365, HL, per Lord Browne-Wilkinson. See also *Newman v Francis* [1953] 1 WLR 402 (recreational spaces); *Watt v Kesteven County Council* [1955] 1 QB 408, [1955] 1 All ER 473, CA (education) (but cf *Meade v Haringey London Borough Council* [1979] 2 All ER 1016, [1979] 1 WLR 637, CA); *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL (regulation of prisons); *O'Rourke v Camden London Borough Council* [1998] AC 188, [1997] 3 All ER 23, HL (social policy of housing the homeless). For general statements of relevant factors see *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407, [1949] 1 All ER 544 at 548, HL, per Lord Simonds; *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243 at 266, [1954] 2 All ER 625 at 637, CA, per Romer LJ; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185-186, [1981] 2 All ER 456 at 461, HL, per Lord Diplock; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson.

8 *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 170-171, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733 at 751, HL, per Lord Jauncey of Tullichettle.

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#### **499. Effect of provision of statutory remedy for breach of duty.**

In general, where an obligation is created by statute which at the same time enforces its performance in a specified manner, that performance cannot be enforced in any other manner<sup>1</sup>. However, this rule is subject to the ordinary rules as to the construction of statutes<sup>2</sup>. Where the only manner of enforcing performance for which the statute provides is by means of criminal proceedings, there are two classes of prima facie exception to the general rule<sup>3</sup>. The first is where the obligation was imposed for the benefit or protection of a particular class of

individuals<sup>4</sup>. The second is where the statute creates a public right and a particular member of the public suffers particular direct and substantial damage other and different from that which was common to the rest of the public<sup>5</sup>.

Where the statute creates a self-contained code in which fines are only one method of enforcement for which provision is made, that is an indicator that no civil cause of action arises<sup>6</sup>. The availability of general public law remedies may also point in the same direction<sup>7</sup>.

1 See *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847 at 859 per Lord Tenterden CJ; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407, [1949] 1 All ER 544 at 548, HL, per Lord Simonds; and **STATUTES** vol 44(1) (Reissue) PARA 1360. For examples see *Atkinson v Newcastle and Gateshead Waterworks Co* (1877) 2 ExD 441, CA; *Vallance v Falle* (1884) 13 QBD 109, DC; *Saunders v Holborn District Board of Works* [1895] 1 QB 64, DC; *Robinson v Workington Corp* [1897] 1 QB 619, CA; *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, CA; *Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365, [1939] 1 All ER 259, CA; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, [1949] 1 All ER 544, HL; *Biddle v Truvox Engineering Co Ltd* [1952] 1 KB 101, [1951] 2 All ER 835; *Bollinger v Costa Brava Wine Co Ltd* [1960] Ch 262, [1959] 3 All ER 800; *Richardson v Pitt-Stanley* [1995] QB 123, [1995] 1 All ER 460, CA.

As to statutes creating a new liability without providing a remedy see eg **STATUTES** vol 44(1) (Reissue) PARA 1362. As to the position where a statute provides a new remedy where a remedy already exists see **STATUTES** vol 44(1) (Reissue) PARA 1363.

2 As to the rules for the interpretation of statutes see **STATUTES** vol 44(1) (Reissue) PARA 1369 et seq. See also **STATUTES** vol 44(1) (Reissue) PARA 1360.

3 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185, [1981] 2 All ER 456 at 461, HL, per Lord Diplock.

4 See PARA 500; *Groves v Lord Wimborne* [1898] 2 QB 402, CA; *Britannic Merthyr Coal Co v David* [1910] AC 74, HL; *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149 at 165, HL, per Lord Kinnear; *Monk v Warbey* [1935] 1 KB 75, CA; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185, [1981] 2 All ER 456 at 461, HL, per Lord Diplock; *Rickless v United Artists Corp* [1988] QB 40, [1987] 1 All ER 679, CA.

5 *Ward v Hobbs* (1878) 4 App Cas 13 at 23, HL, per Earl Cairns LC; *Boyce v Paddington Borough Council* [1903] 1 Ch 109 (affd sub nom *Paddington Corp v A-G* [1906] AC 1, HL); *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185, [1981] 2 All ER 456 at 461-462, HL, per Lord Diplock.

6 *Issa v Hackney London Borough Council* [1997] 1 All ER 999, [1997] 1 WLR 956, CA; see also *Watt v Kesteven County Council* [1955] 1 QB 408, [1955] 1 All ER 473, CA; *Clunis v Camden and Islington Health Authority* [1998] QB 978, [1998] 3 All ER 180, CA. The imposition of such a penalty does not necessarily make the breach a crime: see *A-G v Bradlaugh* (1885) 14 QBD 667 at 687, CA, per Brett MR; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 2. See also *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1994] 4 All ER 602, HL.

7 *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, [1989] 1 All ER 1025, HL (judicial review); *Olotu v Home Office* [1997] 1 All ER 385, [1997] 1 WLR 328, CA (habeas corpus and mandamus (now mandatory order)).

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## 500. Class of persons protected.

An individual may sue for a breach of statutory duty only if he falls within the class of persons upon whom the statute was intended to confer private rights of action. The answer to the question whether the statute confers such rights does not necessarily depend upon whether the statute was intended to protect a limited class of persons or the public as a whole<sup>1</sup>. Nevertheless it is of importance to determine what was the intention of the statute in this

respect<sup>2</sup>, because, if the statute on its true construction is intended to protect a particular class, it is some indication that members of that class are intended to have a right of action<sup>3</sup> (for example, in the case of statutes for the protection of factory workers<sup>4</sup>, merchant seamen<sup>5</sup>, dock labourers<sup>6</sup> and shipyard workers<sup>7</sup>, or intended for the protection of the public when exposed to certain dangers<sup>8</sup>). On the other hand, if the statute is intended to protect the public as a whole, it will not usually be construed as giving a right of action to individual members of a particular class<sup>9</sup>.

In any case in which a class of individuals has a common law right of action in respect of the breach of a duty imposed by a statute, a claimant to succeed must show that he is within the class of persons which is intended to be protected and to which the duty is therefore owed<sup>10</sup>.

1 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185-186, [1981] 2 All ER 456 at 461, HL, per Lord Diplock. See also *Monk v Warbey* [1935] 1 KB 75, CA. See further **INSURANCE** vol 25 (2003 Reissue) PARA 729.

2 See *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149 at 165, HL, per Lord Kinneir; *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243 at 265, [1954] 2 All ER 625 at 637, CA, per Romer LJ; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185, [1981] 2 All ER 456 at 461, HL, per Lord Diplock. If a statute enforced by criminal penalties does not mention civil liability, this is an indicator that no private rights of action are conferred, but it may be countered by showing that the claimant belongs to a class protected by the statute or, if he is suing for breach of a duty to the public at large, that he suffered special damage: see *Lonrho Ltd v Shell Petroleum Co (No 2)* [1982] AC 173 at 185-186, [1981] 2 All ER 456 at 461, HL, per Lord Diplock.

3 See *Couch v Steel* (1854) 3 E & B 402; *Groves v Lord Wimborne* [1898] 2 QB 402, CA; *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149, HL; *Reffell v Surrey County Council* [1964] 1 All ER 743, [1964] 1 WLR 358; *Rickless v United Artists Corp* [1988] QB 40, [1987] 1 All ER 679, CA.

4 See *Groves v Lord Wimborne* [1898] 2 QB 402, CA. Cf *Biddle v Truvox Engineering Co Ltd* [1952] 1 KB 101, [1951] 2 All ER 835 (purely penal provision). See also **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 416, 482 et seq. A duty which is imposed on the occupier of a factory may be owed not only to his own employees but also to other workers working in the factory: see *Wigley v British Vinegars Ltd* [1964] AC 307, [1962] 3 All ER 161, HL. See also **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 457. As to legislation in respect of offices, shops and railway premises under which a right of action is available to individuals see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 527 et seq.

5 See *Couch v Steel* (1854) 3 E & B 402.

6 See *Hawkins v Thames Stevedore Co Ltd and Union Cold Storage Co Ltd* [1936] 2 All ER 472. See **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 706 et seq.

7 See *Smith v Cammell Laird & Co Ltd* [1940] AC 242, [1939] 4 All ER 381, HL.

8 Examples of provisions so intended are provisions regulating level crossings, gates or fences in connection with railways (*Williams v Great Western Rly Co* (1874) LR 9 Exch 157, as explained in *Wakelin v London and South Western Rly Co* (1886) 12 App Cas 41 at 43, HL, per Lord Halsbury LC (arguendo); *Parkinson v Garstang and Knott End Rly Co* [1910] 1 KB 615, DC; *Charman v South Eastern Rly Co* (1888) 21 QBD 524, CA; and see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 352 et seq), and provisions as to means of escape in case of fire (*Solomons v R Gertzenstein Ltd* [1954] 2 QB 243, [1954] 2 All ER 625, CA).

9 See *Clegg Parkinson & Co v Earby Gas Co* [1896] 1 QB 592 at 594 per Wills J; *Heath's Garage Ltd v Hodges* [1916] 2 KB 370, CA; *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, CA; *Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365, [1939] 1 All ER 259, CA; *London Armoury Co v Ever Ready (Great Britain) Ltd* [1941] 1 KB 742, [1941] 1 All ER 364; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, [1949] 1 All ER 544, HL; *Coote v Stone* [1971] 1 All ER 657, [1971] 1 WLR 279, CA; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 185-186, [1981] 2 All ER 456 at 461, HL, per Lord Diplock (in order to succeed, a claimant must show that he suffered particular direct and substantial damage, other and different from that common to the public at large). But cf *Roe v Sheffield City Council* [2003] EWCA Civ 1, [2004] QB 653, [2003] LGR 389 (persons using the highway a sufficiently limited class).

10 See *Read v Croydon Corp* [1938] 4 All ER 631; *Knapp v Railway Executive* [1949] 2 All ER 508, CA; *Hartley v Mayoh & Co* [1954] 1 QB 383, [1954] 1 All ER 375, CA; *Greenhalgh v British Railways Board* [1969] 2 QB 286, [1969] 2 All ER 114, CA; *RCA Corp v Pollard* [1983] Ch 135 at 150, [1982] 3 All ER 771 at 780, CA.

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### 501. Type of damage.

For a claim for breach of statutory duty to succeed, it must be shown that the injury or damage suffered by the claimant was of the kind which the statute was intended to prevent. A statute intended to protect against the occurrence of loss in a particular manner will not support a claim in respect of a loss occurring by another manner<sup>1</sup>. Nor will a statute intended to protect only against physical harm support a claim in respect of pure economic loss<sup>2</sup>.

If the only damage that breach of the statute is likely to cause is damage that is not of a kind for which the law generally awards damages, that may indicate that the statute creates no private right of action<sup>3</sup>.

1 See *Gorris v Scott* (1874) LR 9 Exch 125 (distinguished in *Grant v National Coal Board* [1956] AC 649, [1956] 1 All ER 682, HL); *Rodgers v National Coal Board* [1966] 3 All ER 124, [1966] 1 WLR 1559. Numerous decisions have affirmed that the statutory duty to fence dangerous machinery provides a cause of action only for injury caused by contact with the moving parts and not for injury suffered from parts or material ejected from the machine: see *Nicholls v F Austin (Leyton) Ltd* [1946] AC 493, [1946] 2 All ER 92, HL; *Carrol v Andrew Barclay & Sons Ltd* [1948] AC 477, [1948] 2 All ER 386, HL; *Close v Steel Co of Wales* [1962] AC 367, [1961] 2 All ER 953, HL. Nor is the fencing obligation intended to protect against injury caused by contact between the moving parts and a tool: see *Sparrow v Fairey Aviation Co Ltd* [1964] AC 1019, [1962] 3 All ER 706, HL; but cf *Midland and Low Moor Iron and Steel Co Ltd v Cross* [1965] AC 343, [1964] 3 All ER 752, HL. Even if there is no liability under the statute, there may be liability for common law negligence: see *Kilgollan v William Cooke & Co Ltd* [1956] 2 All ER 294, [1956] 1 WLR 527, CA.

As to the onus of proof of damage resulting from a breach of statutory duty see PARA 509. As to the measure of damages see PARA 516.

2 *Wentworth v Wiltshire County Council* [1993] QB 654, [1993] 2 All ER 256, CA. See also *Murphy v Brentwood District Council* [1991] 1 AC 398 at 490, [1990] 2 All ER 908, HL, per Lord Oliver of Aylmerton. Cf *Merlin v British Nuclear Fuels plc* [1990] 2 QB 557, [1990] 3 All ER 711 (claim for pure economic loss under Nuclear Installations Act 1965).

3 *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, [1991] 1 All ER 622, HL (disclosure of private information). See now **CONFIDENCE AND DATA PROTECTION**.

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### 502. Liability of public authorities.

Local authorities and other bodies with statutory powers and duties are subject to the principles set out above in the same way as all persons<sup>1</sup>, but in practice their liability is limited because many statutes under which they act are intended to pursue goals of a regulatory or welfare nature and not to give rise to private rights of action<sup>2</sup>. In addition, a duty may involve an element of discretion that indicates that Parliament did not intend to create such rights<sup>3</sup>. The failure to exercise a statutory power does not give rise to liability for breach of statutory duty and is actionable in common law negligence only in exceptional circumstances<sup>4</sup>.

1 As to the construction of statutes imposing duties see PARA 498 et seq. As to the interpretation of statutes see generally **STATUTES** vol 44(1) (Reissue) PARA 1369 et seq.

2 See *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731-732, [1995] 3 All ER 353 at 364, HL, per Lord Browne-Wilkinson and PARA 498 note 7. Naturally, if on the construction of a particular statute such rights do arise, there may be liability for breach of statutory duty: see eg *Carpenter v Finsbury Borough Council* [1920] 2 KB 195. As to the liability of a highway authority for failure to repair the highway see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARAS 302-306.

3 See *Dann v Department of Health* [1998] PIQR P226 at P228, CA, per Leggatt LJ; and PARA 498 note 6.

4 See further PARAS 457, 720; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 190. As to breach of statutory duty see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 186 et seq. As to negligence generally see **NEGLIGENCE**.

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### 503. Special provisions governing health and safety at work.

The Health and Safety at Work etc Act 1974<sup>1</sup> provides for the making of regulations to replace the existing statutory provisions<sup>2</sup> relating to health and safety at work<sup>3</sup>. A civil claim lies for breach of these regulations except in so far as the regulations provide otherwise<sup>4</sup>. The Health and Safety at Work etc Act 1974 does not affect the extent to which breach of a duty imposed by any previously existing statutory provisions is actionable<sup>5</sup>.

1 See **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 302 et seq. See also *Richardson v Pitt-Stanley* [1995] QB 123 at 132, [1995] 1 All ER 460 at 468, CA, per Stuart-Smith LJ (the court will more readily construe a statutory provision as providing a civil cause of action where it relates to the safety and health of a class of persons rather than where they have merely suffered economic loss).

2 As to the meaning of 'existing statutory provisions' see the Health and Safety at Work etc Act 1974 s 53(1); and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 302.

3 See the Health and Safety at Work etc Act 1974 s 15; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 424-425.

4 See the Health and Safety at Work etc Act 1974 s 47(2) (amended by the Employment Protection Act 1975 ss 116, 125(3), Sch 15 para 14, Sch 18); and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARAS 416, 430. This provision came into force on 1 January 1975 and the power to make new regulations came into force on 1 October 1974: Health and Safety at Work etc Act 1974 (Commencement No 1) Order 1974, SI 1974/1439. Civil liability for breach of statutory duty is expressly limited by the Management of Health and Safety at Work Regulations 1999, SI 1999/3242, reg 22 (substituted by SI 2006/438) of which provides that breach of a duty imposed on an employer or employee by the same regulations does not confer a right of action in any civil proceedings in so far as that duty applies for the protection of a person other than the employer and persons in his employment. However, other regulations made under the Health and Safety at Work etc Act 1974 s 47(2) do not restrict civil liability (see eg the Workplace (Health, Safety and Welfare) Regulations 1992, SI 1992/3004). See further **HEALTH AND SAFETY AT WORK**.

5 See the Health and Safety at Work etc Act 1974 s 47(1)(b); and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 416.

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## C. NATURE AND EXTENT OF STATUTORY DUTIES AND LIABILITIES

### 504. Absolute and qualified duties.

The nature of the duty imposed by a statute is a matter of the construction of the provision in question<sup>1</sup>. In some cases the obligation is absolute<sup>2</sup>, that is to say, all that is necessary to prove a breach of the duty is to show that the requirements of the statute have not in fact been complied with, and it is not necessary for the claimant in a claim for breach of duty to show how the failure to comply arose or that the defendant was guilty of any failure to take reasonable care to comply; nor is it normally<sup>3</sup> a defence for the defendant to show that he took all reasonable precautions to secure compliance<sup>4</sup>. In certain instances, the duty imposed by a statute is subject to express qualification, for example, that compliance is to be ensured 'so far as is reasonably practicable' and such words must be construed in their particular statutory context<sup>5</sup>. In other cases, the relevant provision may be interpreted as establishing nothing more than a statutory duty of care<sup>6</sup>.

<sup>1</sup> *Hammond v St Pancras Vestry* (1874) LR 9 CP 316; *J and J Makin Ltd v London and North Eastern Rly Co* [1943] KB 467, [1943] 1 All ER 645, CA.

<sup>2</sup> Absolute liability is to be regarded as exceptional in English law and must be imposed in clear language: *J and J Makin Ltd v London and North Eastern Rly Co* [1943] KB 467 at 471, [1943] 1 All ER 645 at 648, CA, per Lord Greene MR; *Allison v London Underground* [2008] EWCA Civ 71 at [32], [2008] ICR 719 at [32], [2008] IRLR 440 at [32] per Smith LJ. But if on the true construction of the particular enactment the court finds that the liability is absolute, the fact that an absolute liability may appear contrary to natural justice cannot impede the court from adopting that construction: *J and J Makin Ltd v London and North Eastern Rly Co* [1943] KB 467 at 471, [1943] 1 All ER 645 at 648, CA. As to the construction of statutes to determine whether or not duties are imposed see **STATUTES** vol 44(1) (Reissue) PARA 1337.

For analysis of the terms 'absolute liability', 'no-fault liability' and 'strict liability' see *Allison v London Underground* [2008] EWCA Civ 71 at [31], [2008] ICR 719 at [31], [2008] IRLR 440 at [31] per Smith LJ. As to the justification of absolute liability see *Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening)* [2008] UKHL 43 at [28], [2008] 1 AC 1399 at [28], [2008] 4 All ER 525 at [28] per Lord Scott of Foscote.

<sup>3</sup> As to special statutory defences see PARA 510. As to other defences see PARAS 511-515.

<sup>4</sup> See eg *Galashiels Gas Co Ltd v O'Donnell (or Millar)* [1949] AC 275, [1949] 1 All ER 319, HL; *John Summers & Sons Ltd v Frost* [1955] AC 740 at 759, [1955] 1 All ER 870 at 877, HL, per Lord Morton of Henryton; *Hamilton v National Coal Board* [1960] AC 633, [1960] 1 All ER 76, HL; and the text and note 2.

<sup>5</sup> See eg *John Summers & Sons Ltd v Frost* [1955] AC 740 at 775, [1955] 1 All ER 870 at 877, HL, where Lord Morton of Henryton cited instances of duties imposed by the factories legislation which were expressly qualified. See also note 2. The imposition of a duty 'so far as is reasonably practicable' may indicate a legislative intention to reverse the ordinary burden of proof: see *Nimmo v Alexander Cowan & Sons Ltd* [1968] AC 107, [1967] 3 All ER 187, HL.

<sup>6</sup> See PARA 496. A court considering a claim in breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care, whether by taking precautions against a risk or otherwise, have regard to whether a requirement to take those steps might prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or discourage persons from undertaking functions in connection with a desirable activity: Compensation Act 2006 s 1.

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### 505. Delegation of performance of statutory duty.

Where on the true construction of a statute a personal duty is imposed on an employer to perform an act or to secure that the act is performed, the employer cannot, unless the statute permits him to do so<sup>1</sup>, delegate his duty to an employee or other person so as to relieve himself from liability to a third person for injury suffered through a failure properly to perform the duty<sup>2</sup>. However, if the person who has suffered the injury is the person to whom performance of the duty was entrusted, he cannot recover against the employer if the employer proves that the injury was solely due to the employee's own fault<sup>3</sup>, and there was no contributory fault on his part which went beyond or was independent of the fault of the employee<sup>4</sup>.

1 See eg the Highways Act 1980 s 58(1); PARA 510; and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302.

2 *Vincent v Southern Rly Co* [1927] AC 430 at 437, HL; *Lochgelly Iron and Coal Co Ltd v M'Mullan* [1934] AC 1 at 8-9, 13, HL; *Yelland v Powell Duffryn Associated Collieries Ltd* [1941] 1 KB 154, [1941] 1 All ER 278, CA. See also **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 419. This is so even though the employer is a limited company which can act only through its employees or agents: *Yelland v Powell Duffryn Associated Collieries Ltd* [1941] 1 KB 154, [1941] 1 All ER 278, CA. Such a duty is the employer's personal duty whether he performs or can perform it himself, or whether he does not or cannot perform it save by his employees or agents: *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57 at 83-84, [1937] 3 All ER 628 at 643, HL. A similar rule exists with regard to the liability of an authority for the negligent exercise of its statutory powers (see eg **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 184; **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 305) and in cases where a personal duty exists at common law (see eg PARA 710 et seq). As to the liability of a shipowner for the negligence of his agents when he is bound by statute to exercise due diligence to make a ship seaworthy see **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 376.

3 *Smith v Baveystock & Co Ltd* [1945] 1 All ER 531, CA; *Manwaring v Billington* [1952] 2 All ER 747, CA. See also *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414, approved in *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452, [1964] 1 WLR 768 (the question is 'who was at fault?'); *Boyle v Kodak Ltd* [1969] 2 All ER 439, [1969] 1 WLR 661, HL. The employee may not be at fault if the duty delegated was beyond his competence: see *Byers v Head Wrightson & Co Ltd* [1961] 2 All ER 538, [1961] 1 WLR 961.

4 The fact that the immediate and direct cause of the injury was some wrongful act on the part of the employee is not decisive, since it may also appear that something was done or omitted by the employer which caused or contributed to the accident, eg a lack of proper supervision or instructions, the employment of insufficiently experienced men, or past acquiescence by the employer in wrong behaviour by the employee: *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414 at 424 per Pearson J. See also eg *Cakebread v Hopping Bros (Whetstone) Ltd* [1947] KB 641, [1947] 1 All ER 389, CA; *McMath v Rimmer Bros (Liverpool) Ltd* [1961] 3 All ER 1154, [1962] 1 WLR 1, CA; *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452, [1964] 1 WLR 768, HL; *Boyle v Kodak Ltd* [1969] 2 All ER 439, [1969] 1 WLR 661, HL. Even if not able to recover under the statute, the claimant may be able to recover at common law: *Barcock v Brighton Corp'n* [1949] 1 KB 339, [1949] 1 All ER 251. See further **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 419.

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### 506. Vicarious liability.

Notwithstanding past doubts on the question<sup>1</sup>, it has now been authoritatively determined that an employer may be liable vicariously for his employee's breach of statutory duty where the duty is imposed on the employee and not on the employer, unless the statute expressly or impliedly indicates otherwise<sup>2</sup>.

1 The question was left open in *Harrison v National Coal Board* [1951] AC 639, [1951] 1 All ER 1102, HL, and *National Coal Board v England* [1954] AC 403, [1954] 1 All ER 546, HL.

2 *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] 4 All ER 395. In Scotland, it has long been accepted that an employer may be vicariously liable in such circumstances: *Nicol v National Coal Board* (1952) 102 L Jo 357, Ct of Sess.

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### 507. Limitation of actions.

The period of limitation for claims founded on tort<sup>1</sup> applies to a claim for damages for breach of statutory duty<sup>2</sup>.

1 The six years or, in the case of personal injury claims, three years: see the Limitation Act 1980 ss 2, 11, 12; PARA 478 et seq; and **LIMITATION PERIODS** vol 68 (2008) PARA 979 et seq.

2 See **LIMITATION PERIODS** vol 68 (2008) PARA 985. Where part of the injury was suffered outside the limitation period but a material part was suffered within the period, the claimant can recover in respect of the whole of the injury (*Clarkson v Modern Foundries Ltd* [1958] 1 All ER 33, [1957] 1 WLR 1210), unless reasonably certain quantification of the two elements is possible (*Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405, [1984] 1 All ER 881). See further **STATUTES** vol 44(1) (Reissue) PARA 1360.

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### D. CAUSATION

#### 508. In general.

In general, the claimant in a claim for breach of statutory duty can recover only if the damage which he has suffered was caused or materially contributed to by the breach of duty<sup>1</sup>. In exceptional cases, causation can be made out by proof that the defendant's breach of duty materially contributed to the risk which eventuated, or the same kind of risk as eventuated, causing the damage in question<sup>2</sup>. Whether sufficient causal connection between the breach and the damage is established is a matter to be determined by applying common sense to the facts of the case<sup>3</sup>.

1 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; *Clarke v ER Wright & Son* [1957] 3 All ER 486, [1957] 1 WLR 1191, CA. Cf where the claimant's own conduct was the exclusive cause of the accident: *Norris v William Moss & Sons Ltd* [1954] 1 All ER 324, [1954] 1 WLR 346, CA; *Ruston v Turner Bros Asbestos Co Ltd* [1959] 3 All ER 517, [1960] 1 WLR 96; *Horne v Lec Refrigeration Ltd* [1965] 2 All ER 898. As to the necessity to show that the damage was of the kind contemplated by the statute see PARA 501.

2 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305; *Barker v Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572, [2006] 3 All ER 785. Where causation is established on this basis, liability is proportional to the risk created by the defendant, except in the case of mesothelioma where the Compensation Act 2006 s 3 applies. See **HEALTH AND SAFETY AT WORK** vol 53 (2009) PARA 640.

3 *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681, [1953] 2 All ER 478 at 485, HL. See **DAMAGES** vol 12(1) (Reissue) PARAS 854-858.

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### **509. Onus of proof.**

In a claim for damages for breach of statutory duty, the onus of proving that, on a balance of probabilities<sup>1</sup>, the breach caused or materially contributed<sup>2</sup> to the damage to the claimant<sup>3</sup>, or in an appropriate case to the risk of the damage<sup>4</sup>, lies on the claimant unless the statute expressly or by necessary implication provides otherwise<sup>5</sup>. The onus of proving the causal connection between the breach and the injury is not discharged by proving the breach and damage which by its nature could have resulted from the breach<sup>6</sup>.

1 See *Corn v Weir's Glass (Hanley) Ltd* [1960] 2 All ER 300 at 306, [1960] 1 WLR 577 at 584, CA.

2 As to the measure of damages where there were causes of damage other than the breach of duty see PARA 516.

3 The onus of proving the breach of duty also lies on the claimant in the absence of countervailing statutory language: see PARA 495 note 2.

4 Ie when the liability is for material contribution to risk under the exception recognised in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305: see PARA 508 note 2.

5 *Grand Trunk Rly Co v McAlpine* [1913] AC 838, PC; *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, [1939] 3 All ER 722, HL; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, [1956] 1 All ER 615, HL; *Corn v Weir's Glass (Hanley) Ltd* [1960] 2 All ER 300 at 306, [1960] 1 WLR 577 at 584, CA. Lord Wilberforce's contrary approach in *McGhee v National Coal Board* [1972] 3 All ER 1008 at 1012, [1973] 1 WLR 1 at 6, HL, was disapproved by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32, [2002] 3 All ER 305. Where the breach of duty consists in the failure to provide safety equipment, the claimant must prove that he would have employed it if it had been provided: *Nolan v Dental Manufacturing Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936; *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 All ER 623, [1962] 1 WLR 295, HL; *Wigley v British Vinegars Ltd* [1964] AC 307, [1962] 3 All ER 161, HL.

6 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620, [1956] 1 All ER 615 at 618, HL, per Lord Reid; *Quinn v Cameron and Robertson Ltd* [1958] AC 9 at 23, [1957] 1 All ER 760 at 764, HL, per Viscount Simonds ('post hoc, ergo propter hoc' is a fallacy). Cf *Gardiner v Motherwell Machinery and Scrap Co Ltd* [1961] 3 All ER 831n, [1961] 1 WLR 1424, HL; *McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, HL.

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## **E. DEFENCES**

### **510. Statutory defences.**

A defence to a civil claim for breach of statutory duty is in certain cases specially provided by statute. Thus it is a defence in a claim against a highway authority in respect of damage resulting from its failure to maintain a highway maintainable at the public expense to prove that the authority has taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the claim relates was not dangerous for traffic<sup>1</sup>.

1 See the Highways Act 1980 s 58(1); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302. As to the liability in tort of highway authorities see PARA 424. The defence is available without prejudice to any other defence or the application of the law relating to contributory negligence: s 58(1). Matters which are in particular to be taken into account for the purposes of the defence are specified in s 58(2): see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 301. It is not relevant to prove that the authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the claim relates, unless it is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions: see s 58(2); and **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 302. See also *Griffiths v Liverpool Corp* [1967] 1 QB 374, [1966] 2 All ER 1015, CA; *Cross v Kirklees Metropolitan Borough Council* [1998] 1 All ER 564, 96 LGR 238, CA; *Jones v Rhondda Cynon Taff CBC* [2008] EWCA Civ 1497, [2009] RTR 151.

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### 511. Claimant as author of his own misfortune.

If the claimant in a claim for breach of statutory duty is shown to have been the sole author of his own misfortune in the sense that the only effective cause of the injury or damage suffered by him was his own negligence, he cannot recover even though the defendant may have been guilty of a breach of statutory duty<sup>1</sup>.

1 *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681, [1953] 2 All ER 478 at 485, HL, per Lord Reid; *Norris v William Moss & Sons Ltd* [1954] 1 All ER 324, [1954] 1 WLR 346, CA; *Rushton v Turner Bros Asbestos Co Ltd* [1959] 3 All ER 517, [1960] 1 WLR 96; *Horne v Lec Refrigeration Ltd* [1965] 2 All ER 898. The application of this principle in cases where the execution of a statutory duty was entrusted to the claimant is considered in PARA 505. See also *Ginty v Belmont Building Supplies Ltd* [1959] 1 All ER 414, approved in *Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452, [1964] 1 WLR 768, HL; *Boyle v Kodak Ltd* [1969] 2 All ER 439, [1969] 1 WLR 661, HL. As to causation see PARA 508.

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### 512. Contributory negligence.

Contributory negligence is a good partial defence to a claim founded on breach of statutory duty, even if the duty is absolute<sup>1</sup>. This defence is subject to the statutory provisions relating to the apportionment of liability where both parties are at fault for the damage<sup>2</sup>, so that in a case in which both parties are to blame contributory negligence will result in the amount of damages awarded to the claimant being reduced<sup>3</sup>.

1 See eg *Boyle v Kodak Ltd* [1969] 2 All ER 439, [1969] 1 WLR 661, HL; *Mullard v Ben Line Steamers Ltd* [1971] 2 All ER 424, [1970] 1 WLR 1414, CA. Disobedience is not necessarily contributory negligence: *Westwood v Post Office* [1974] AC 1, [1973] 3 All ER 184, HL. It is not every error of judgment, heedlessness or inadvertence with regard to personal safety that serves to establish contributory negligence: see *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 174, [1939] 3 All ER 722 at 736, HL, per Lord Wright. As to liabilities between employer and employee see PARA 672 et seq. See also **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 418. As to the defence of contributory negligence generally see PARA 512; and **DAMAGES** vol 12(1) (Reissue) PARAS 1047-1050; **NEGLIGENCE** vol 78 (2010) PARAS 75-82.

2 See the Law Reform (Contributory Negligence) Act 1945 s 1(1); and **DAMAGES** vol 12(1) (Reissue) PARAS 876, 933; **NEGLIGENCE** vol 78 (2010) PARAS 75, 82. 'Fault' includes breach of statutory duty: see s 4.

3 See eg *Cakebread v Hopping Bros (Whetstone) Ltd* [1947] KB 641, [1947] 1 All ER 389, CA; *Beal v E Gomme Ltd* (1949) 65 TLR 543, CA; *Cork v Kirby Maclean Ltd* [1952] 2 All ER 402, CA; *Stapley v Gypsum Mines Ltd* [1953] AC 663, [1953] 2 All ER 478, HL; *Williams v Sykes and Harrison Ltd* [1955] 3 All ER 225, [1955] 1 WLR 1180, CA; *Hodkinson v Henry Wallwork & Co Ltd* [1955] 3 All ER 236, [1955] 1 WLR 1195, CA; *Davison v Apex Scaffolds Ltd* [1956] 1 QB 551, [1956] 1 All ER 473, CA. See also **NEGLIGENCE** vol 78 (2010) PARA 82.

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### 513. Voluntary assumption of risk.

The defence of *volenti non fit injuria*<sup>1</sup> is available only if the defendant is not himself in breach of statutory duty and is not in breach of any statutory duty vicariously through the neglect of some person who (if a fellow employee) is of superior rank to the claimant and whose commands the claimant is bound to obey or who had some special and different duty of care<sup>2</sup>. The defence is not available in any other circumstances<sup>3</sup>.

1 As to this defence see PARA 465; and **NEGLIGENCE** vol 78 (2010) PARAS 69-72.

2 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at 687, [1964] 2 All ER 999, HL, per Lord Pearce.

3 *Baddeley v Earl of Granville* (1887) 19 QBD 423; *Davies v Thomas Owen & Co Ltd* [1919] 2 KB 39; *Wheeler v New Merton Board Mills Ltd* [1933] 2 KB 669, CA; *Alford v National Coal Board* [1952] 1 All ER 754 at 757, HL, per Lord Normand.

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### 514. Intervention of a third person.

No liability will arise where the damage suffered by the claimant was due not to a breach of duty by the defendant but to some independent act of a third person which the defendant could not reasonably foresee or guard against: the maxim *novus actus interveniens* applies<sup>1</sup>. Whether the maxim applies in any particular claim depends on the construction of the particular statute imposing the duty<sup>2</sup>.

1 *Groves v Lord Wimborne* [1898] 2 QB 402 at 418, CA; *Horton v Caplin Contracts Ltd* [2002] EWCA Civ 1604, [2003] ICR 179. Cf *Northwestern Utilities Ltd v London Guarantee and Accident Co* [1936] AC 108, PC (unreasonable failure to foresee and guard against third party's intervention). See also **DAMAGES** vol 12(1) (Reissue) PARA 857; **NEGLIGENCE** vol 78 (2010) PARA 76.

2 *Cooper v Railway Executive (Southern Region)* [1953] 1 All ER 477 at 479, [1953] 1 WLR 223 at 228 per Devlin J; *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 31-32, sub nom *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481 at 492, HL, per Lord Hoffmann (considering the issue in connection with criminal liability for breach of the statute).

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### **515. Act of God.**

The defence of act of God<sup>1</sup> may apply to the failure to fulfil an obligation created by statute, but whether it does apply depends on the construction of the particular statute<sup>2</sup>. In the case of a statute which is to be construed as creating an absolute duty or imposing on any person liability for the damage occasioned by a particular state of circumstances, the defence is not as a rule available<sup>3</sup>.

1 As to the defence of act of God see PARA 469.

2 *River Wear Comrs v Adamson* (1877) 2 App Cas 743 at 750, HL, per Lord Cairns LC; *Great Western Rly Co v Mostyn (Owners)*, *The Mostyn* [1928] AC 57 at 74, HL, per Viscount Dunedin, and at 104 per Lord Blanesburgh.

3 See eg *Nitro-Phosphate and Odam's Chemical Manure Co v London and St Katharine Docks Co* (1878) 9 ChD 503, CA; *J and J Makin Ltd v London and North Eastern Rly Co* [1943] KB 467, [1943] 1 All ER 643, CA.

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## **F. DAMAGES**

### **516. Measure of damages.**

The damages recoverable in respect of a breach of statutory duty are such as are contemplated by the statute, and this will include damages for an injury which is a foreseeable consequence of the breach but occurs in an entirely unforeseeable way<sup>1</sup>. Where the defendant's breach of duty materially contributes to the claimant's loss or injury, and there are other contributory causes, he is liable only to the extent of his contribution unless the loss or injury is indivisible<sup>2</sup>.

1 *Millard v Serck Tubes Ltd* [1969] 1 All ER 598, [1969] 1 WLR 211, CA. As to the application of the test of reasonable foreseeability to torts generally see **DAMAGES** vol 12(1) (Reissue) PARAS 851-853.

2 *Crookall v Vickers-Armstrong Ltd* [1955] 2 All ER 12, [1955] 1 WLR 659; *Holtby v Birgham & Cowan (Hull) Ltd* [2000] 3 All ER 421, [2000] ICR 1086, CA.

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## **(4) MISREPRESENTATION**

### **517. In general.**

Liability for misrepresentation may arise under the specific torts of malicious falsehood (which incorporates slander of title and slander of goods)<sup>1</sup> and deceit<sup>2</sup>, under the statutory cause of

action created by the Misrepresentation Act 1967<sup>3</sup>, and in the tort of negligence at common law<sup>4</sup>.

Libel and slander<sup>5</sup> are torts of misrepresentation in a loose sense, but it is not for the claimant to prove that the defendant has made a false representation; instead it is open to the defendant to exculpate himself by proving the truth of his defamatory statement<sup>6</sup>.

1 See PARA 518.

2 See PARA 519.

3 See PARA 520; and **MISREPRESENTATION AND FRAUD**.

4 See PARA 521; and **NEGLIGENCE**.

5 See PARA 558 et seq; and **LIBEL AND SLANDER**.

6 See PARA 560.

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### **518. Malicious falsehood and slander.**

A claim may be brought for written or oral falsehoods which are published maliciously and are calculated in the ordinary course of things to produce, and do produce, special damage<sup>1</sup>. Two particular forms of this tort of injurious falsehood are slander of title<sup>2</sup> and slander of goods<sup>3</sup>. In no form of this tort is it necessary to allege or prove special damage if (1) the words on which the claim is founded are calculated to cause pecuniary damage to the claimant and are published in writing or other permanent form; or (2) the words are calculated to cause pecuniary damage to the claimant in respect of any office, profession, calling, trade or business held or carried on by him at the time of publication<sup>4</sup>.

1 *Ratcliffe v Evans* [1892] 2 QB 524 at 527, CA. See also *Joyce v Sengupta* [1993] 1 All ER 897, [1993] 1 WLR 337. As to malicious or injurious falsehood see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 274 et seq.

2 As to slander of title see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 276.

3 As to slander of goods see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 277-278.

4 Defamation Act 1952 s 3(1). See further **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 274-275, 285-286. Provided the claimant is entitled to sue for malicious falsehood, whether on proof of special damage or by reason of s 3 of the 1952 Act, he may be entitled in an appropriate case to aggravated damages for injury to feelings: *Khodaparast v Shad* [2000] 1 All ER 545, [2000] 1 WLR 618, CA.

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### **519. Deceit.**

On proof of the following matters a claim in tort (often called an 'action of deceit') is maintainable for damages in respect of fraudulent misrepresentation at the suit of the person to whom the representation is made<sup>1</sup>:



- 16 (1) that the alleged representation consisted of something said, written or done which amounts in law to a representation<sup>2</sup>;
- 17 (2) that the defendant was the person who made the representation<sup>3</sup>;
- 18 (3) that the claimant was the person to whom the representation was made<sup>4</sup>;
- 19 (4) that the representation was false<sup>5</sup>;
- 20 (5) that the representation was a material inducement to the claimant to act on it<sup>6</sup>;
- 21 (6) that the claimant in fact altered his position by it<sup>7</sup>;
- 22 (7) that the representation was fraudulent<sup>8</sup>; and
- 23 (8) that the claimant thereby suffered damage<sup>9</sup>.

Contributory negligence cannot be raised as a defence to an action of deceit<sup>10</sup>.

1 As to the action of deceit generally see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 789 et seq.

2 As to what amounts to a representation see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 703-716.

3 As to the representor see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 726-734.

4 As to the representee see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 735-741.

5 As to falsity see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 742 et seq.

6 As to inducement and materiality see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 765-777.

7 As to alteration of position see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 778-780.

8 As to fraudulent misrepresentation see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 755-761.

9 As to damage see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 791-793.

10 See *Alliance and Leicester Building Society v Edgestop Ltd* [1994] 2 All ER 38, [1993] 1 WLR 1462; *Nationwide Building Society v Thimbleby & Co* [1999] All ER (D) 211. See also **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 761. As to contributory negligence see **DAMAGES** vol 12(1) (Reissue) PARAS 1047-1050; **NEGLIGENCE** vol 78 (2010) PARA 75 et seq.

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## **520. Damages under the Misrepresentation Act 1967.**

Where a person has entered into a contract after a misrepresentation has been made to him by another party to it and as a result he suffered loss, then, if the person making the misrepresentation would be liable to damages in respect of it had the misrepresentation been made fraudulently, that person may be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true<sup>1</sup>.

1 See the Misrepresentation Act 1967 s 2(1); and **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801.

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### **521. Negligent misrepresentation.**

Subject to the ordinary requirements of the law of negligence, a person may owe a duty of care not to make false statements which result in physical harm to another or to his property. In certain circumstances there may also be a duty not to make false statements which cause economic loss. In order to be liable for such a false statement the defendant must generally have assumed some responsibility for the advice, opinion or information which he has tendered to the claimant, directly or indirectly, in circumstances where he knows that the advice, opinion or information will be communicated to the claimant, either specifically or as a member of an ascertainable class, and is likely to be relied upon by the claimant for the purpose for which the communication, provided the circumstances are such that the claimant can reasonably rely on the defendant's skill or judgment. The duty of care may arise in such a case whether the communication is in the course of the defendant's business or on some other occasion on which it is clear that the communication was intended seriously and meant to be relied upon<sup>1</sup>.

<sup>1</sup> See **NEGLIGENCE** vol 78 (2010) PARA 14.

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## **(5) STRICT AND ABSOLUTE LIABILITY**

### **522. In general.**

A number of tortious causes of action may be considered to create strict or absolute liabilities. The expression 'strict liability' is typically used where liability cannot be excused on the ground that it is not practicable or reasonably practicable to avoid the risk. 'Absolute' or 'no-fault liability' is reserved for the much smaller class of obligations which impose liability for something which the defendant could not have avoided even by the exercise of all possible care<sup>1</sup>. Both strict and absolute liability may arise in the tort of breach of statutory duty depending on the construction of the statutory provision in question<sup>2</sup>. Absolute liability arises at common law under the rule in *Rylands v Fletcher*<sup>3</sup>. The statutory liability for damage caused by dangerous animals may also be considered an absolute liability<sup>4</sup>. Other causes of action in the law of tort may be considered to have elements of strict or absolute liability, even if fault in some sense is normally required to be proved<sup>5</sup>.

<sup>1</sup> *Allison v London Underground* [2008] EWCA Civ 71 at [31], [2008] ICR 719 at [31], [2008] IRLR 440 at [31] per Smith LJ. As to the justification of liability in the absence of fault see *Lewisham London Borough Council v Malcolm (Equality and Human Rights Commission intervening)* [2008] UKHL 43 at [28], [2008] 1 AC 1399 at [28], [2008] 4 All ER 525 at [28] per Lord Scott of Foscote.

<sup>2</sup> See PARA 495 et seq.

<sup>3</sup> See *Rylands v Fletcher* (1868) LR 3 HL 330; and PARA 594.

<sup>4</sup> See PARA 523.

<sup>5</sup> For example, in trespass to land it must be shown that the defendant's presence on the land was voluntary, but it is no defence that he reasonably considered the land to be his own: see PARA 572. Similarly, in

private nuisance it is no defence that a person who unreasonably interferes with another's land took reasonable care to avoid the nuisance: *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 at 299, [1994] 1 All ER 53 at 71, HL, per Lord Goff of Chieveley. But fault of some kind almost always has to be proved: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617 at 639, [1966] 2 All ER 709 at 716, PC, per Lord Reid. As to private nuisance generally see PARA 592 et seq.

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### 523. Animals.

In general, where any damage is caused by an animal belonging to a dangerous species<sup>1</sup>, or in certain circumstances a dangerous animal belonging to a non-dangerous species<sup>2</sup>, its keeper is absolutely liable for the damage<sup>3</sup>. Where a dog causes damage by killing or injuring livestock its keeper is strictly liable, subject to certain exceptions<sup>4</sup>. Liability for negligence may arise at common law in the case of all animals<sup>5</sup>. The person to whom livestock belongs is generally absolutely liable for damage or expense caused by their trespass on another's land<sup>6</sup>. In principle, liability may also arise at common law for trespass by an animal.<sup>7</sup>

1 See the Animals Act 1971 s 2(1); and **ANIMALS** vol 2 (2008) PARA 747.

2 See the Animals Act 1971 s 2(2); and **ANIMALS** vol 2 (2008) PARA 748. See also *Cummings v Granger* [1977] QB 397, [1977] 1 All ER 104, CA; *Wallace v Newton* [1982] 2 All ER 106, [1982] 1 WLR 375; *Mirvahedy v Henley* [2003] UKHL 16, [2003] 2 AC 491, [2003] 2 All ER 401.

3 See the Animals Act 1971 s 2; and **ANIMALS** vol 2 (2008) PARA 747 et seq. For prescribed exceptions from liability see s 5(1)-(3); and **ANIMALS** vol 2 (2008) PARA 749. As to the distinction between strict and absolute liability see PARA 522.

4 See the Animals Act 1971 s 3; and **ANIMALS** vol 2 (2008) PARA 921. For the exceptions see s 5(1), (4); and **ANIMALS** vol 2 (2008) PARA 922.

5 See eg *Draper v Hodder* [1972] 2 QB 556, [1972] 2 All ER 210, CA; and **ANIMALS** vol 2 (2008) PARAS 750-751, 754. As to special provisions concerning the duty of care in the case of animals straying onto the highway, or from the highway onto adjoining land, see **ANIMALS** vol 2 (2008) PARA 754 et seq. See also *Davies v Davies* [1975] QB 172, [1974] 3 All ER 817, CA.

6 See the Animals Act 1971 s 4; and **ANIMALS** vol 2 (2008) PARA 755. For prescribed exceptions from liability see s 5(1), (4)-(5); and **ANIMALS** vol 2 (2008) PARA 755. However, it should be noted that a person is not liable for damage or expenses under s 4 where the livestock strayed from a highway and its presence there was a lawful use of the highway: s 5(5). See also **ANIMALS** vol 2 (2008) PARA 756.

7 See *League Against Cruel Sports Ltd v Scott* [1986] QB 240, [1985] 2 All ER 489; cf *Buckle v Holmes* [1926] 2 KB 125, CA (cat-owner not liable for damage to poultry on neighbouring land); **ANIMALS** vol 2 (2008) PARAS 752-757. It should be noted that the Animals Act 1971 replaces the former common law liability for cattle trespass: s 1(1)(c). As to remedies in respect of trespassing animals see **ANIMALS** vol 2 (2008) PARAS 758-761.

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## 3. TORTS TO SPECIFIC INTERESTS

### (1) TORTS TO THE PERSON

## (i) Trespass to the Person

### A. IN GENERAL

#### 524. Classification.

Trespass to the person may be committed by assault<sup>1</sup>, battery<sup>2</sup> or false imprisonment<sup>3</sup>. All forms of trespass are actionable per se, that is, without proof of material damage resulting from the trespass<sup>4</sup>.

The act complained of must be voluntary<sup>5</sup> and intentional<sup>6</sup> or reckless<sup>7</sup>. In the modern law, negligence is insufficient<sup>8</sup>. The onus of proof lies on the claimant<sup>9</sup>. The act must be done without the consent of the person who sues for the wrong<sup>10</sup>.

Wrongs to the person not amounting to trespasses, and so not actionable per se, include: the intentional infliction of physical harm<sup>11</sup>; harassment<sup>12</sup>; malicious prosecution<sup>13</sup>; malicious procurement of a search warrant<sup>14</sup>; malicious issue of civil proceedings<sup>15</sup>; the improper registration of a judgment<sup>16</sup>; abuse of the process of the court to accomplish an improper purpose<sup>17</sup>; and invasion of privacy<sup>18</sup>. In the law of defamation, libel is actionable per se but slander is actionable per se only exceptionally<sup>19</sup>.

By their nature, certain of these classes of wrong may be committed against a legal person, that is to say, not solely against an individual<sup>20</sup>.

1 As to assault see PARA 526.

2 As to battery see PARA 527 et seq.

3 As to false imprisonment see PARA 542 et seq.

4 *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353 at [14] per Lord Bingham of Cornhill.

5 *Gibbons v Pepper* (1695) 1 Ld Raym 38.

6 *Letang v Cooper* [1965] 1 QB 232 at 239-240, [1964] 2 All ER 929, CA, per Lord Denning MR. If however, A, intending to strike B, strikes C by mistake, the injury to C is regarded in law as intentional and A is liable: *James v Campbell* (1832) 5 C & P 372; *Livingstone v Ministry of Defence* [1984] NI 356; *Bici v Ministry of Defence* [2004] EWHC 786 (QB), (2004) Times, 11 June, [2004] All ER (D) 137 (Apr). As to liability for animals see PARA 523; and **ANIMALS** vol 2 (2008) PARAS 747 et seq, 921-922.

7 *Bici v Ministry of Defence* [2004] EWHC 786 (QB), (2004) Times, 11 June, [2004] All ER (D) 137 (Apr). Elias J stated, at [67] and [78], that only subjective recklessness would suffice: the defendant must be indifferent to a known risk.

8 In *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA, Lord Denning MR (with whom Danckwerts LJ agreed) held that if the act were negligent the tort of negligence, and not trespass, should be relied on; Diplock LJ considered that trespass could still be committed negligently but accepted (without deciding) that a negligent trespass might not be actionable per se: see at 244-245 and at 935-936. For practical purposes it seems therefore prudent to treat trespass to the person as a tort of intention or recklessness. Older authorities which assume that trespass to the person can be negligent should be treated with caution: see eg *Alderson v Waistell* (1844) 1 Car & Kir 358; *Holmes v Mather* (1875) LR 10 Exch 261; *Stanley v Powell* [1891] 1 QB 86; *Fowler v Lanning* [1959] 1 QB 426, [1959] 1 All ER 290.

9 *Fowler v Lanning* [1959] 1 QB 426, [1959] 1 All ER 290. The standard of proof is proportionate to the gravity of the allegation: see *Miles v Cain* (1989) Times, 15 December, CA (rape).

10 *Christopherson v Bare* (1848) 11 QB 473; *Freeman v Home Office (No 2)* [1984] QB 524, [1983] 3 All ER 589, CA. See also *Hegarty v Shine* (1878) 4 LR Ir 288, Ir CA (communication of venereal disease not actionable if caused by voluntary illicit intercourse, and consent is not vitiated by concealment of disease); *Latter v Braddell* (1881) 44 LT 369, CA (medical examination of employee, submitted to under orders of employer, without

apprehension of violence, not actionable). Cf **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 115.

11 See PARA 556.

12 See PARA 557.

13 See PARAS 627-657.

14 See PARA 658.

15 See PARAS 659-668.

16 See PARA 669.

17 See PARAS 670, 719.

18 See PARA 561.

19 See PARA 558 et seq.

20 See eg the cases cited in PARAS 660 note 1, 719 note 4. But cf PARA 557 note 2.

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## **525. Limitation of actions; effect of compensation order on damages.**

Trespass is a claim for breach of duty within the meaning of the statutory provisions concerned with limitation<sup>1</sup> so that claims in trespass for personal injuries must generally be brought within the special three-year limitation period for personal injury claims in tort<sup>2</sup>. Time starts to run from the date of the trespass, or from the date of the claimant's knowledge that the injury in question was significant and attributable in whole or in part to the act or omission alleged to constitute the trespass, and of the identity of the defendant<sup>3</sup>. As in other actions in respect of personal injuries or death, the court has a discretion to disapply the limitation period where it considers that it would be equitable to allow an action to proceed<sup>4</sup>.

The damages which may be recovered in civil proceedings for personal injuries, in connection with an offence of which the defendant has been convicted, may be affected by the making of a compensation order or award<sup>5</sup>.

1 See the Limitation Act 1980 s 11; and **LIMITATION PERIODS** vol 68 (2008) PARA 998. See also PARA 478 et seq.

2 *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA; *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, [2008] 2 All ER 1, departing from *Stubbings v Webb* [1993] AC 498, [1993] 1 All ER 322, HL. See further **LIMITATION PERIODS** vol 68 (2008) PARA 998. As to the normal limitation period for claims in tort see PARA 478 et seq.

3 Limitation Act 1980 ss 11(4), 14 (s 14 amended by the Consumer Protection Act 1987 s 6, Sch 1 Pt I para 3). If it is alleged that the act or omission was that of a person other than the defendant, the claimant must also know the identity of that person and the additional facts supporting the bringing of an action against the defendant: Limitation Act 1980 s 14(1)(d). As to the date of knowledge see further **LIMITATION PERIODS**.

4 Limitation Act 1980 s 33 (amended by the Consumer Protection Act 1987 Sch 1 Pt I para 6). As to the factors that are relevant to the exercise of this discretion see **LIMITATION PERIODS**.

5 As to the making and effect of compensation orders see **TORT** vol 45(2) (Reissue) PARAS 682-683.

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## **B. ASSAULT AND BATTERY**

### **(A) IN GENERAL**

#### **526. Assault.**

Assault is an intentional<sup>1</sup> and overt act causing another to apprehend the infliction of immediate and unlawful force<sup>2</sup>. The threat of violence exhibiting an intention to assault will give rise to liability only if there is also a present ability (or perhaps a perceived ability<sup>3</sup>) to carry the threat into execution<sup>4</sup>. An assault may be committed by words or gestures alone, provided they cause an apprehension of immediate and unlawful force<sup>5</sup>. Thus it is an assault for one person unlawfully to advance towards another in a threatening manner and with his fist clenched, with the intention of striking the other immediately<sup>6</sup>; or to point or brandish a weapon at another with the intention of using it<sup>7</sup>; or to present a firearm at another with a threat of shooting<sup>8</sup>; or to pursue another in a threatening manner so as to compel him to run for shelter to avoid being beaten<sup>9</sup>. A silent telephone call that intentionally causes fear of immediate and unlawful personal violence is also an assault<sup>10</sup>.

1 See PARA 524. There appears to be no decision in which mere negligence has been held sufficient to constitute an assault.

2 *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370 at [74], [2007] QB 846 at [74], [2007] 2 WLR 1062 at [74]. See also Buller's Law of Nisi Prius 15; 1 Hawk PC c 15(2) s 1, and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 147-151.

3 It has been submitted that it is an assault to make a threat with an unloaded pistol, provided there is nothing to indicate that the pistol is unloaded or that the defendant does not intend to fire it: *R v St George* (1840) 9 C & P 483 at 493 per Parke B. Cf *Blake v Barnard* (1840) 9 C & P 626. See also *Osborn v Veitch* (1858) 1 F & F 317 (guns only at half-cock); and Buller's Law of Nisi Prius 15.

4 *Read v Coker* (1853) 13 CB 850; *Mbasogo v Logo Ltd* [2006] EWCA Civ 1370, [2007] QB 846, [2007] 2 WLR 1062. It is not an assault for one person merely passively to obstruct the movements of another, as by barring his entrance into a room: *Innes v Wylie* (1844) 1 Car & Kir 257. Photographing a person against his or her will is not an assault: *Murray v Minister of Defence* [1985] 12 NIJB 12.

5 *R v Ireland* [1998] AC 147, [1997] 4 All ER 225, HL, disapproving *R v Meade and Belt* (1823) 1 Lew CC 184. Accompanying words may deprive otherwise threatening action of its effect (*Tuberville v Savage* (1669) 1 Mod Rep 3) or render otherwise ambiguous action threatening (*Read v Coker* (1853) 13 CB 850). Where words cause nervous shock they may be actionable: see *Wilkinson v Downton* [1897] 2 QB 57; and PARA 556. Words and gestures, however threatening, will not be an assault if it is clear they cannot be put into effect: *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, [1985] 2 All ER 1.

6 *Stephens v Myers* (1830) 4 C & P 349. If the offer of violence is such that the threatened blow would almost immediately have reached the person threatened, if the assailant had not been stopped, it is an assault, even though at the time the assailant was not near enough to have struck the other person: *Stephens v Myers* (1830) 4 C & P 349.

7 *Genner v Sparks* (1704) 1 Salk 79.

8 See *R v St George* (1840) 9 C & P 483; and note 3.

9 *Mortin v Shoppee* (1828) 3 C & P 373.

10 *R v Ireland* [1998] AC 147, [1997] 4 All ER 225, HL.

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### 527. Battery.

A battery is an act of the defendant<sup>1</sup> which directly and intentionally or recklessly<sup>2</sup> causes<sup>3</sup> some physical contact with the person of the claimant without his consent<sup>4</sup>. The term 'assault' is commonly, if strictly inaccurately, used to include battery.

1 As to the requirement for an act of the defendant see PARA 529.

2 *Letang v Cooper* [1965] 1 QB 232, [1964] 2 All ER 929, CA; *Bici v Ministry of Defence* [2004] EWHC 786 (QB), (2004) Times, 11 June, [2004] All ER (D) 137 (Apr). In the modern law, negligence is probably not enough: see PARA 524. If the defendant strikes a blow at one person but hits another whom he did not intend to harm, he is nonetheless liable for the battery: *Livingstone v Ministry of Defence* [1984] NI 356, CA; *Bici v Ministry of Defence* [2004] EWHC 786 (QB), (2004) Times, 11 June, [2004] All ER (D) 137 (Apr).

3 As to causation see PARA 530.

4 As to absence of consent see PARA 528.

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### 528. Absence of consent.

If the claimant has consented to the contact or has permitted it, either expressly or impliedly<sup>1</sup>, there is no battery<sup>2</sup>. A participant in a sport, game or horseplay impliedly consents to the contacts which can reasonably be expected to occur in its course<sup>3</sup>. But the implied consent does not extend to serious foul play<sup>4</sup> or the use of force out of all proportion to the occasion<sup>5</sup>. An apparent consent may be vitiated by the defendant's fraud as to the nature of the contact<sup>6</sup>, but not merely as to the circumstances in which it is to occur<sup>7</sup>. A lack of informed consent as to the risks inherent in a medical procedure does not vitiate the patient's consent to it, provided he knows its nature in broad terms, but there may be an action in negligence for breach of the duty to inform<sup>8</sup>.

1 See eg *Latter v Braddell* (1881) 44 LT 369, CA (submission to medical examination).

2 *Christopherson v Bare* (1848) 11 QB 473 at 477 per Patteson J; *Latter v Braddell* (1881) 50 LJQB 448, CA; *Freeman v Home Office (No 2)* [1984] QB 524, [1983] 3 All ER 589, CA. In a fight otherwise than in the course of a sport it is no defence to a criminal charge of assault that the other consented to the fight where actual bodily harm was intended: *A-G's Reference (No 6 of 1980)* [1981] QB 715, [1981] 2 All ER 1057, CA. In such a case, it seems that a tort action for battery will normally be barred by the maxim *ex turpi causa non oritur actio* (see *Matthew v Ollerton* (1693) Comb 218; *Boulter v Clark* (1747) Bull NP 16; *Murphy v Culhane* [1977] QB 94, [1976] 3 All ER 533, CA) unless the defendant resorts to excessive force out of proportion to the occasion (*Lane v Holloway* [1968] 1 QB 379, [1967] 3 All ER 129, CA).

3 *Blake v Galloway* [2004] EWCA Civ 814, [2004] 3 All ER 315, [2004] 1 WLR 2844, CA. As to liability in negligence in this context see *Condon v Basi* [1985] 2 All ER 453, [1985] 1 WLR 866, CA; *Affutu-Nartey v Clarke* (1984) Times, 9 February.

4 There may be implied consent to some conduct outside the rules that may be expected to occur in the heat of the moment: see *R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113, [2005] 1 WLR 910.

5 *Lane v Holloway* [1968] 1 QB 379, [1967] 3 All ER 129, CA.

6 *Appleton v Garrett* [1996] PIQR P1 (unnecessary dental treatment). Relevant criminal cases include *R v Williams* [1923] 1 KB 340; *R v Tabassum* [2000] 2 Cr App R 328. A mistake as to identity may also suffice, but there was no criminal liability for assault when patients accepted treatment from a dentist not knowing that she was suspended from practice since there was only a mistake of attribute not of identity, but the court said that a civil action might lie: *R v Richardson* [1999] QB 444, [1998] 2 Cr App Rep 200, CA.

7 Failure to reveal a communicable disease prior to sexual contact is not fraud as to the nature of the act vitiating consent: see *Hegarty v Shine* (1878) 14 Cox CC 145; *R v Clarence* (1888) 22 QBD 23, CCA. See also *R v Linekar* [1995] QB 250, [1995] 3 All ER 69; *R v Richardson* [1999] QB 444, [1998] 2 Cr App Rep 200, CA.

8 *Chatterton v Gerson* [1981] QB 432, [1981] 1 All ER 257. See also **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 198.

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### 529. Act of the defendant.

To constitute a battery there must be a voluntary<sup>1</sup> and positive<sup>2</sup> act on the part of the defendant. There can be no battery unless there is contact with the person of the claimant, whether directly or by a weapon or projectile<sup>3</sup>. The touching must exceed the bounds of what is 'generally acceptable in the ordinary conduct of daily life', so pushing past someone on the street or seizing someone's hand to shake it is not a battery<sup>4</sup>.

1 *Gibbons v Pepper* (1695) 2 Salk 637.

2 Merely to obstruct another is not a battery: *Innes v Wylie* (1844) 1 Car & Kir 257. Cf *Fagan v Metropolitan Police Comr* [1969] 1 QB 439, [1968] 3 All ER 442, DC (continuing act); *DPP v Santa-Bermudez* [2003] EWHC 2908 (Admin), (2004) 168 JP 373 (deception creating danger).

3 See eg *Collins v Renison* (1754) Say 138 (overturning a ladder on which a person is standing and causing him to fall); *Hopper v Reeve* (1817) 7 Taunt 698 (injuring the person of another by driving a carriage against another carriage in which he is sitting); *Forde v Skinner* (1830) 4 C & P 239 (parish officers cutting off the hair of a pauper without her consent); *Pursell v Horn* (1838) 8 Ad & El 602 (throwing water); *Dumbell v Roberts* [1944] 1 All ER 326 at 330, CA, per Scott LJ (taking fingerprints without permission); *Nash v Sheen* (1953) Times, 13 March (hairdresser liable for applying a tone-rinse to plaintiff's hair without her consent).

4 *Collins v Wilcock* [1984] 3 All ER 374 at 378, [1984] 1 WLR 1172 at 1177, DC, per Robert Goff LJ; *Re F* [1990] 2 AC 1 at 72-73, sub nom *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 563-564, HL, per Lord Goff of Chieveley, doubting the requirement suggested in some earlier cases that the touching had to be 'hostile': see *Cole v Turner* (1704) 6 Mod Rep 149 (battery is the least touching of another in anger); *Coward v Baddeley* (1859) 4 H & N 478; *Wilson v Pringle* [1987] QB 237, [1986] 2 All ER 440, CA (schoolboy horseplay; 'hostility' not to be equated with ill-will or malevolence or an intention to injure). It is clear that liability for battery may arise for contacts that are not 'hostile' in the ordinary sense: *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541, [1997] 2 FLR 426, CA (medical treatment). See also *Williams v Jones* (1736) Lee temp Hard 298 at 301 per Lord Hardwicke CJ; *Donnelly v Jackman* [1970] 1 All ER 987, [1970] 1 WLR 562, DC.

It is artificial to exclude liability for acceptable everyday contacts on the basis of implied consent: *Re F* [1990] 2 AC 1 at 72, sub nom *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 563, HL, per Lord Goff of Chieveley.



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### **530. Causation.**

The unlawful act of the defendant must directly cause the contact of which the claimant complains if he is to succeed in his claim of battery<sup>1</sup>.

<sup>1</sup> *Dodwell v Burford* (1670) 1 Mod Rep 24. If A throws an object at B, and B to protect his person or property throws the object from him and it strikes or explodes so as to injure C, this is a trespass to the person of C by A: *Scott v Shepherd* (1773) 2 Wm Bl 892. Striking a mother so she drops a child she is carrying is also a battery on the child: *Haystead v Chief Constable of Derbyshire* [2000] 3 All ER 890, [2000] 2 Cr App Rep 339 (criminal liability). See **DAMAGES** vol 12(1) (Reissue) PARAS 854-858.

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## **(B) DEFENCES**

### **531. Lawful arrest and the prevention of crime.**

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large<sup>1</sup>.

<sup>1</sup> Criminal Law Act 1967 s 3(1). The provision replaces the corresponding rules of the common law: s 3(2). See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 926. What is reasonable is a question of fact: *Farrell v Secretary of State for Defence* [1980] 1 All ER 166, [1980] 1 WLR 172, HL; see also *Pollard v Chief Constable of West Yorkshire* [1999] PIQR P219, CA. As to the former common law see *Williams v Jones* (1736) Lee temp Hard 298; *Handcock v Baker* (1800) 2 Bos & P 260. As to arrest generally see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 910 et seq; **POLICE** vol 36(1) (2007 Reissue) PARA 523. As to the right of the police to call upon bystanders for assistance see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 738; **POLICE** vol 36(1) (2007 Reissue) PARA 480.

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### **532. Acting in defence of person.**

A person who is sued for an assault or battery may justify the act on the ground that it was committed in the defence of his own person and that he used no more force than was reasonably necessary<sup>1</sup> or at least avoided force that was grossly disproportionate<sup>2</sup>. A person is not entitled to use force in self-defence merely because he believes he is under threat, when in fact he is not, but it has not yet been decided whether he must actually be under attack or under threat of imminent attack, or if it is enough that he reasonably believed that he was<sup>3</sup>.

Anyone may defend another person who is unlawfully attacked<sup>4</sup>.

1 This is the test at common law: see *Cook v Beal* (1697) 1 Ld Raym 176 (if A strikes B, B cannot justify drawing a sword and cutting off A's hand); *Cockroft v Smith* (1705) 11 Mod Rep 43; *Dean v Taylor* (1855) 11 Exch 68. The person threatened with attack may strike the first blow (*Chaplain of Gray's Inn Case* (1400) YB 2 Hen IV fo 8 pl 40) and may adopt a fighting posture (*Moriarty v Brooks* (1834) 6 C & P 684 at 685).

2 A test of whether the act was 'grossly disproportionate' applies to the statutory defence arising where the defendant acted only because he believed it was necessary to defend himself or another person and that the claimant was about to commit an offence, was in the course of committing an offence, or had committed an offence immediately beforehand: see the Criminal Justice Act 2003 s 329; and PARA 541.

3 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962, [2008] 3 All ER 573.

4 *Handcock v Baker* (1800) 2 Bos & P 260; *R v Duffy* [1967] 1 QB 63, [1966] 1 All ER 62, CCA.

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### 533. Acting in defence of one's property.

A person who is sued for an assault or a battery may justify the act on the ground that it was committed in defending his land or chattels against a person threatening to commit or committing a trespass to the property, and that he used no more force than was reasonably necessary<sup>1</sup> or at least avoided force that was grossly disproportionate<sup>2</sup>. This defence is not limited to spontaneous acts done in response to actual violence and may extend to the use of arms with which the property owner has equipped himself in advance against an imminent apprehended attack<sup>3</sup>. What is reasonable in the circumstances may depend upon whether the trespasser had notice of the measures taken by the owner<sup>4</sup>. He may expel the trespasser by force, but if the entry was peaceable, he must first request him to leave<sup>5</sup>. To justify defence of property a party must either be in possession of the property (whether rightfully or not) or have a right to possession<sup>6</sup>.

1 This is the test at common law: see eg *Stroud v Bradbury* [1952] 2 All ER 76, DC. A defendant is not justified in overturning a ladder on which the claimant is standing, where the claimant is trespassing on the defendant's land and refuses to leave on request (*Collins v Renison* (1754) 138, nor in wounding the claimant while turning him out of the defendant's house (*Moriarty v Brooks* (1834) 6 C & P 684). The more violent the attack, the stronger may be the response: *R v Hussey* (1924) 18 Cr App Rep 160, CCA (gunshot fired against trespassers armed with implements). See also *Simpson v Morris* (1813) 4 Taunt 821.

2 A test of whether the act was 'grossly disproportionate' applies to the statutory defence arising where the defendant acted only because he believed it was necessary to do so to protect property and that the claimant was about to commit an offence, was in the course of committing an offence, or had committed an offence immediately beforehand: see the Criminal Justice Act 2003 s 329; and PARA 541.

3 *A-G's Reference (No 2 of 1983)* [1984] QB 456, [1984] 1 All ER 988, CA. Possession of the arms may however involve the commission of a criminal offence.

4 *Ilott v Wilkes* (1820) 3 B & Ald 304. Cf *Bird v Holbrook* (1828) 4 Bing 628.

5 *Green v Goddard* (1702) 2 Salk 641.

6 *Dean v Hogg* (1834) 10 Bing 345; *Holmes v Bagge* (1853) 1 E & B 782. Licensees with a right to occupy are in a similar position to that of a licensee with de facto possession: see *Manchester Airport plc v Dutton* [2000] QB 133, sub nom *Dutton v Manchester Airport plc* [1999] 2 All ER 675, CA.

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### 534. Re-entry on land.

At common law a person who is entitled to the immediate possession of land may enter on the land, and in a civil claim may justify the use of so much force as is necessary to enable him to effect that entry and to expel an intruder from the land<sup>1</sup>, provided the force used is reasonable or at least falls short of being grossly disproportionate<sup>2</sup>.

1 This is the test at common law: *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720, CA. See also *Harvey v Brydges* (1845) 14 M & W 437 (affd (1847) 1 Exch 261, Ex Ch); *Scott v Matthew Brown & Co Ltd* (1884) 51 LT 746, [1881-85] All ER Rep 1043; *McPhail v Persons, names unknown* [1973] Ch 447, [1973] 3 All ER 393, CA.

A right of re-entry or forfeiture in a lease on a dwelling, and (subject to exceptions) a right to recover possession of a tenancy which has come to an end, may not be enforced otherwise than by proceedings in court (see the Protection from Eviction Act 1977 ss 2, 3 (s 3 amended by the Housing Act 1988 s 30); see also the Protection from Eviction Act 1977 s 1 (amended by the Magistrates' Court Act 1980 s 32(2); and the Housing Act 1988 s 29) for offences) and it is an offence for a person who is not a displaced residential occupier or a protected intending occupier to use or threaten violence, without lawful authority, to secure entry to premises while someone is known to be present on the premises and opposed to the entry (see the Criminal Law Act 1977 ss 6, 12(3)-(5), (7), 12A; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 602). The effect of the Rent Acts in limiting recovery of possession should also be considered. See further **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 831; and cf **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 608-610. The statutes referred to above do not, however, affect the defence to a civil claim mentioned in the text: see *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720 at 737, CA, per Bankes LJ, and at 747 per Scrutton LJ; *McPhail v Persons, names unknown* [1973] Ch 447 at 459, [1973] 3 All ER 393 at 398, CA, per Lord Denning MR.

2 A test of whether the act was 'grossly disproportionate' applies to the statutory defence arising where the defendant acted only because he believed it was necessary to do so to recover property and that the claimant was about to commit an offence, was in the course of committing an offence, or had committed an offence immediately beforehand: see the Criminal Justice Act 2003 s 329; and PARA 541.

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### 535. Retaking goods.

It is a defence to a claim for assault or battery that reasonable force (or at least force that was not grossly disproportionate<sup>1</sup>) was used to retake or protect chattels which were being wrongfully withheld from the defendant<sup>2</sup>, but it is not lawful to imprison a person to achieve this<sup>3</sup>.

1 A test of whether the act was 'grossly disproportionate' applies to the statutory defence arising where the defendant acted only because he believed it was necessary to do so to recover property and that the claimant was about to commit an offence, was in the course of committing an offence, or had committed an offence immediately beforehand: see the Criminal Justice Act 2003 s 329; and PARA 541.

2 *Blades v Higgs* (1861) 10 CBNS 713; affd on another point (1865) 11 HL Cas 621. As to the protection of goods in the possession of the owner see **TORT** vol 45(2) (Reissue) PARA 670.

3 *Harvey v Mayne* (1872) IR 6 CL 417; cf *Sunbolf v Alford* (1838) 3 M & W 248. See also *Harrison v Duke of Rutland* [1893] 1 QB 142, CA (protecting goods from trespasser on highway), now qualified by *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL (relaxing permissible use of highway).

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### 536. Parental or other authority.

Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment<sup>1</sup>. In other cases, an act which is otherwise an assault or battery may be justified if it is done by a parent<sup>2</sup>, teacher<sup>3</sup> or the master of a ship<sup>4</sup> in pursuance of disciplinary powers conferred on him by law<sup>5</sup>.

1 Children Act 2004 s 58(3). 'Actual bodily harm' has the same meaning as it has for the purposes of the Offences against the Person Act 1861 s 47 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 149): Children Act 2004 s 58(4). See also PARA 437.

2 See *R v Derrivière* (1969) 53 Cr App Rep 637, CA (immigrant parents must conform to English standards). Cf *R v Rahman* (1985) 81 Cr App Rep 349, CA (false imprisonment). An older sibling has no right to administer punishment to a younger sibling: *R v Woods* (1921) 85 JP 272.

3 See *Ryan v Fildes* [1938] 3 All ER 517 (excessive punishment). The Education Act 1996 s 548 (see **EDUCATION** vol 15(1) (2006 Reissue) PARA 493) now prohibits corporal punishment of children in both state schools and independent schools.

4 See *The Agincourt* (1824) 1 Hag Adm 271; *King v Franklin* (1858) 1 F & F 360; *Aldworth v Stewart* (1866) 4 F & F 957; *Hook v Cunard Steamship Co Ltd* [1953] 1 All ER 1021, [1953] 1 WLR 682. See also the Merchant Shipping Act 1995 s 105; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 631. As to acts done by the pilot of an aircraft, and assistance by crew and passengers, see the Civil Aviation Act 1982 s 94(2)-(4); and **AIR LAW** vol 2 (2008) PARA 641 et seq.

5 It seems unlikely, but perhaps theoretically possible, that discipline in respect of which a defence arises in a civil action for assault or battery might constitute a violation of the punished person's right not to be subject to inhuman or degrading treatment or punishment under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 3: see *A v United Kingdom* (Case 100/1997/884/1096) [1998] 3 FCR 597, 5 BHRC 137, ECtHR (violation of art 3 notwithstanding successful defence to criminal charge of battery).

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### 537. Claimant's fault.

There is some authority supporting the view that damages for trespass to the person may be reduced for contributory negligence where the claimant suffers damage partly as a result of his own fault and partly of an assault or battery committed against him by another person<sup>1</sup>. However, this seems to conflict with the view that contributory negligence can never be a defence to a defendant who intended to harm the claimant, so the point is best regarded as awaiting authoritative determination<sup>2</sup>.

<sup>1</sup> Reductions in the damages for contributory negligence were made in *Wasson v Chief Constable of Northern Ireland* [1987] NI 420 and *Ward v Chief Constable of the Royal Ulster Constabulary* [2000] NI 543, both first-instance decisions. Further supporting dicta may also be found in *Murphy v Culhane* [1977] QB 94 at 98-99, [1976] 3 All ER 533 at 536, CA, per Lord Denning MR; *Barnes v Nayer* (1986) Times, 19 December, CA, per May LJ; *Bici v Ministry of Defence* [2004] EWHC 786 (QB) at [111], (2004) Times, 11 June at [111], [2004] All ER (D) 137 (Apr) at [111] per Elias J; *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25 at [20], [2008] 1 AC 962 at [20], [2008] 3 All ER 573 at [20] per Lord Scott of Foscote, and at [51] per Lord Rodger of Earlsferry.

In *Lane v Holloway* [1968] 1 QB 379, [1967] 3 All ER 129, CA, following *Fontin v Katapodis* (1962) 108 CLR 177, it was decided that the claimant's provocation of an attack could properly serve to reduce the level of aggravated or exemplary damages but could not be used to reduce the level of compensatory damages.

In an appropriate case, the claimant's fault taken with the surrounding circumstances may indicate that he has voluntarily assume the risk of injury and so trigger the defence of *volenti non fit injuria*: see PARA 465.

<sup>2</sup> See *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2002] UKHL 43 at [45], [2003] 1 AC 959 at [45], [2003] 1 All ER 173 at [45] per Lord Rodger of Earlsferry; and PARA 512.

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### **538. Mental disorder.**

It is no defence to assault or battery that the defendant did not know that what he was doing was wrong unless it is also proved that his condition prevented him from forming the intention to make contact or cause the apprehension of contact with the person of the claimant<sup>1</sup>.

<sup>1</sup> *Morriss v Marsden* [1952] 1 All ER 925. See also **MENTAL HEALTH** vol 30(2) (Reissue) PARA 611.

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## **(C) REMEDIES**

### **539. Self-defence.**

A person who is assaulted may defend himself by the use of such force as is reasonably necessary<sup>1</sup>.

<sup>1</sup> See PARA 532.

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### **540. Legal proceedings.**

A claim may be brought without proof of damage for an assault or battery<sup>1</sup>, and criminal proceedings may also be taken against the offender. The injured party may pursue both remedies except where summary proceedings are taken<sup>2</sup>.

In a claim of assault or battery the claimant is entitled to recover by way of general damages compensation for any physical or mental injury which the assault has caused, and for the associated suffering or injury to feelings; these damages are determined by the circumstances of time and place and the manner of the wrong<sup>3</sup>. Consequential damages are recoverable if not too remote<sup>4</sup>.

1 See PARA 524.

2 In summary proceedings for a common assault or an aggravated assault on a male child or on a female, a certificate of dismissal of the charge against the defendant on its merits, or the payment of the fine or the suffering of the imprisonment awarded on conviction, will release the defendant from all further proceedings, civil or criminal, for the same cause: see the Offences against the Person Act 1861 s 45; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 151. See also *Masper v Brown* (1876) 34 LT 254; *Reed v Nutt* (1890) 24 QBD 669; *Ellis v Burton* [1975] 1 All ER 395, [1975] 1 WLR 386, DC; *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932, CA. A conviction or dismissal of a charge against an employee, however, is no bar to a claim against the employer (*Dyer v Munday* [1895] 1 QB 742, CA; and see further PARA 697); nor is the binding over of the defendant to keep the peace, without conviction or dismissal, a bar to a claim in tort against him in respect of the same cause (*Hartley v Hindmarsh* (1866) LR 1 CP 553; *Gibbons v Harris* (1956) 106 L Jo 828). In *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, [1981] 3 All ER 727, HL, it was held to be an abuse of the process of the court to initiate proceedings for the purpose of mounting a collateral attack upon a decision in previous proceedings in which the intending plaintiff had a full opportunity for argument.

3 See **DAMAGES** vol 12(1) (Reissue) PARA 940. Damages for injury to feelings should be awarded as general rather than aggravated damages, except possibly in a wholly exceptional case: *Richardson v Howie* [2004] EWCA Civ 1127, [2005] PIQR Q3. As to exemplary damages in trespass and aggravation of damages see **DAMAGES** vol 12(1) (Reissue) PARAS 811, 1114-1117. There is no hard and fast rule about whether separate awards should be made for psychiatric injury and injury to feelings: if the psychiatric harm is very modest and merges with the injury to feelings, a single award covering both aspects may be more convenient, but a separate award may be warranted if the psychiatric harm is more substantial: *Martins v Choudhary* [2007] EWCA Civ 1379, [2008] 1 WLR 617 (harassment).

4 See **DAMAGES** vol 12(1) (Reissue) PARAS 812, 940. As to remoteness of damage see **DAMAGES** vol 12(1) (Reissue) PARAS 804, 851 et seq.

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#### **541. Civil proceedings for trespass to the person brought by offender.**

Where a person (the 'claimant') claims that another person (the 'defendant') did an act amounting to trespass to the claimant's person<sup>1</sup>, and the claimant has been convicted in the United Kingdom of an imprisonable offence<sup>2</sup> committed on the same occasion as that on which the act is alleged to have been done, civil proceedings relating to the claim may be brought only with the permission of the court<sup>3</sup>. The court may give permission for the proceedings to be brought only if there is evidence that either (1) the condition mentioned below is not met; or (2) in all the circumstances, the defendant's act was grossly disproportionate<sup>4</sup>. The condition referred to is that the defendant did the act only because (a) he believed<sup>5</sup> that the claimant was about to commit an offence, was in the course of committing an offence, or had committed an offence immediately beforehand; and (b) he believed that the act was necessary to defend himself or another person, protect or recover property, prevent the commission or continuation of an offence, or apprehend, or secure the conviction, of the claimant after he had committed an offence, or was necessary to assist in achieving any of those things<sup>6</sup>.

If the court gives permission and the proceedings are brought, it is a defence for the defendant to prove both that the condition mentioned above is met, and that, in all the circumstances, his act was not grossly disproportionate<sup>7</sup>.

1 The reference to trespass to the person is a reference to assault, battery, or false imprisonment: Criminal Justice Act 2003 s 329(8)(a).

2 'Imprisonable offence' means an offence which, in the case of a person aged 18 or over, is punishable by imprisonment: Criminal Justice Act 2003 s 329(8)(d).

Where a person is convicted of an offence under the Armed Forces Act 2006 s 42 (criminal conduct) and the corresponding offence under the law of England and Wales (within the meaning given by that section: see **ARMED FORCES**) is an imprisonable offence, he is to be treated for the purposes of the Criminal Justice Act 2003 s 329 as having been convicted in the United Kingdom of that corresponding offence; and in s 329(7)(a) the reference to conviction includes anything that under the Armed Forces Act 2006 s 376(1), (2) is to be treated as a conviction: Criminal Justice Act 2003 s 329(7) (substituted by the Armed Forces Act 2006 s 378(1), Sch 16 para 232).

3 Criminal Justice Act 2003 s 329(1), (2). 'Court' means the High Court or a county court: s 329(8)(c). A failure to get permission does not render proceedings void and can, if appropriate, be cured on application to the court, which can reflect in costs its view of the conduct of proceedings: *Adorian v Metropolitan Police Comr* [2009] EWCA Civ 18, [2009] 4 All ER 227, [2009] 1 WLR 1859, [2009] CP Rep 21.

4 Criminal Justice Act 2003 s 329(3).

5 References to a defendant's belief are to his honest belief, whether or not the belief was also reasonable: Criminal Justice Act 2003 s 329(8)(b).

6 Criminal Justice Act 2003 s 329(5).

7 Criminal Justice Act 2003 s 329(4). This is without prejudice to any other defence: s 329(6).

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## **C. FALSE IMPRISONMENT**

### **(A) IN GENERAL**

#### **542. Restraint of person.**

A claim of false imprisonment lies at the suit of a person unlawfully imprisoned against the person who causes the imprisonment<sup>1</sup>. Any total restraint of the liberty of the person, for however short a time, by the use or threat of force or by confinement, is an imprisonment<sup>2</sup>. It is not necessary that the person detained is aware of the detention at the time<sup>3</sup>. To compel a person to remain in a given place is an imprisonment, but merely to obstruct a person attempting to pass in a particular direction or to prevent him from moving in any direction but one is not<sup>4</sup>. A prisoner whose liberty has been taken away by lawful authority has no residual liberty enabling him to bring a claim for false imprisonment against the prison authorities or Home Office in respect of his confinement within a particular part of the prison<sup>5</sup>.

The gist of the claim of false imprisonment is the mere imprisonment<sup>6</sup>. The claimant need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification<sup>7</sup>.

1 See PARA 543 et seq.

2 There is an imprisonment if A, with the intention of detaining B, locks the door of a room (*Williams v Jones* (1736) Lee temp Hard 298 at 301 per Lord Hardwicke CJ), or places a sentinel at the door of a house and so prevents B from leaving the room or house (*Glynn v Houstoun* (1841) 2 Man & G 337). If a police officer tells a person charged that he must go with the officer, and the person charged submits and goes, this is an imprisonment, even though there is no touching of the person (*Horner v Battyn* (1739) Bull NP 61; *Pocock v Moore* (1825) Ry & M 321; *Chinn v Morris* (1826) 2 C & P 361; and see also *Wood v Lane* (1834) 6 C & P 774; *Grainger v Hill* (1838) 4 Bing NC 212), but if a person charged goes voluntarily with a police officer to the police station without being taken in charge, or told that he must come, this is no imprisonment (*Arrowsmith v Le Mesurier* (1806) 2 Bos & PNR 211; *Cant v Parsons* (1834) 6 C & P 504; *Peters v Stanway* (1835) 6 C & P 737; and see also *Berry v Adamson* (1827) 6 B & C 528). If C gives D in charge to a police officer, but the officer does not take D into custody, there is no imprisonment: *Simpson v Hill* (1795) 1 Esp 431; see also *Bieten v Burrigge* (1811) 3 Camp 139; *George v Radford* (1828) 3 C & P 464. If a person who is charged with an offence is bailed and not committed to prison, the fact that he is in the custody of his bail and may be arrested at any time by his bail (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1176) does not constitute an imprisonment for which a claim will lie: *Syed Mahamad Yusuf-ud-Din v Secretary of State for India in Council* (1903) 19 TLR 496, PC.

3 *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 at 53-54, CA, per Aitkin LJ; *Murray v Ministry of Defence* [1988] 2 All ER 521 at 528-529, [1988] 1 WLR 692 at 701-702, HL, per Lord Griffiths. Lord Griffiths was of the opinion that *Herring v Boyle* (1834) 1 Cr M & R 377, to apparently opposite effect, would not be decided the same way today: *Murray v Ministry of Defence* [1988] 2 All ER 521 at 528, [1988] 1 WLR 692 at 701, HL. Cf *R v Bournewood Community and Mental Health NHS Trust, ex p L* [1999] 1 AC 458, [1998] 3 All ER 289, HL.

4 *Wright v Wilson* (1699) 1 Ld Raym 739; *Bird v Jones* (1845) 7 QB 742; *Robinson v Balmain New Ferry Co Ltd* [1910] AC 295, PC.

5 *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL. Loss of residual liberty may however constitute damage for the purposes of establishing liability in the tort of misfeasance in public office: *Karagozlu v Metropolitan Police Comr* [2006] EWCA Civ 1691, [2007] 2 All ER 1055, [2007] 1 WLR 1881. Cf *Racz v Home Office* [1994] 2 AC 45, [1994] 1 All ER 97, HL (the Home Office may be vicariously liable for acts of prison officers constituting misfeasance in public office). As to misfeasance in public office see PARA 719. Liability for false imprisonment may arise if the period of lawful detention is exceeded: see *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19, [2000] 4 All ER 15, HL.

6 *Brandt v Craddock* (1858) 27 LJ Ex 314. It is not false imprisonment to refuse to bring a miner to the surface before the proper time (*Herd v Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67, HL), or to refuse to unlock the gates of a factory to allow a workman to leave before the proper time (*Burns v Johnston* [1917] 2 IR 137, Ir CA). See also *Robinson v Balmain New Ferry Co Ltd* [1910] AC 295, PC.

7 *Holroyd v Doncaster* (1826) 3 Bing 492; *Hicks v Faulkner* (1881) 8 QBD 167 at 170, DC, per Hawkins J (affd (1882) 46 LT 127, CA). In a claim of malicious prosecution, the burden lies on the claimant throughout to prove malice and the absence of reasonable and probable cause: see PARA 646.

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### **543. False imprisonment and malicious prosecution distinguished.**

The imprisonment for which the claim for false imprisonment lies must be the act of the defendant or of some one for whose acts he is liable<sup>1</sup>, or the result of his ordering, procuring, instigating or actively inciting the arrest<sup>2</sup>. Merely providing a police constable with information which would justify an arrest, and leaving him to exercise a discretion whether or not to effect the arrest, is insufficient to found a liability in false imprisonment<sup>3</sup>, but if the information is false and given maliciously the giver may be regarded as the initiator of proceedings for the tort of malicious prosecution<sup>4</sup>. No claim for false imprisonment otherwise lies against a person who takes proceedings before a magistrate or judge in respect of an imprisonment which is caused



by the orders of the magistrate or judge; the remedy, if any, of the person imprisoned in such a case, is a claim for malicious prosecution against the person who instituted the proceedings<sup>5</sup>.

1 A principal is liable for a false imprisonment which is the act of his agent, if that act is authorised by the principal or is within the scope of the agent's employment: see PARAS 429, 431.

2 See *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, CA. If A induces B to arrest C, A is not liable for false imprisonment if B exercises an independent discretion: see PARA 544.

3 *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, CA.

4 *Martin v Watson* [1996] AC 74, [1995] 3 All ER 559, HL.

5 *Barber v Rollinson* (1833) 1 Cr & M 330; *West v Smallwood* (1838) 3 M & W 418; *Lock v Ashton* (1848) 12 QB 871; *Brown v Chapman* (1848) 6 CB 365; *Austin v Dowling* (1870) LR 5 CP 534 at 540 per Willes J. As to the tort of malicious prosecution see PARA 627. As to the distinction between false imprisonment and malicious prosecution see also PARA 628. A claim of false imprisonment does not lie against the person originating the charge in respect of a lawful remand which is the act of the magistrate: *Lock v Ashton* (1848) 12 QB 871; *Brown v Chapman* (1848) 6 CB 365. Persons exercising judicial functions in a court are not liable to proceedings for things done within their jurisdiction: see PARA 458; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 197 et seq. A magistrate who remands a person charged for an unreasonable time is not liable to a claim of false imprisonment, unless he acted outside his jurisdiction and in bad faith: see the Courts Act 2003 ss 31, 32; and **MAGISTRATES**. As to the liability of persons involved in the execution of warrants see PARA 545 et seq.

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#### **544. Arrest by a private person.**

A private person may be liable in false imprisonment if he arrests or otherwise detains another<sup>1</sup>. He has certain powers of lawfully arresting others, and he is not liable in false imprisonment for a lawful arrest<sup>2</sup>. He must bring the person whom he has lawfully arrested before a magistrate or a police constable, not necessarily forthwith, but as soon as is reasonably possible<sup>3</sup>. If he fails to comply with this rule he is liable in a claim for false imprisonment<sup>4</sup>.

Even though a private person does not effect the arrest himself he may be liable for an arrest made by a police constable at his instigation, if he is to be regarded as being active in promoting and causing the detention of the claimant<sup>5</sup>. However, the mere giving of information to a police officer, although it may lead to an arrest, does not make the giver of the information liable for the imprisonment<sup>6</sup>.

A person arrested must be informed as soon as practicable of the reason for the arrest<sup>7</sup>.

1 *Clubb v Wimpey & Co Ltd* [1936] 1 All ER 69; on appeal [1936] 3 All ER 148, CA.

2 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 925, 930. See also **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 115. Anyone may use reasonable force in preventing crime, or in effecting or assisting the lawful arrest of an offender or persons unlawfully at large: see the Criminal Law Act 1967 s 3(1); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 926. What is reasonable is a question of fact: *Farrell v Secretary of State for Defence* [1980] 1 All ER 166, [1980] 1 WLR 172, HL.

3 *John Lewis & Co Ltd v Tims* [1952] AC 676, [1952] 1 All ER 1203, HL.

4 *John Lewis & Co Ltd v Tims* [1952] AC 676, [1952] 1 All ER 1203, HL.

5 *Warner v Riddiford* (1858) 4 CBNS 180; *Aitken v Bedwell* (1827) Mood & M 68 (arrest by soldiers). See also *Flewster v Role* (1808) 1 Camp 187.

6 *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, CA (store detective giving information about shoplifter). See also *Gosden v Elphick* (1849) 4 Exch 445 (distinguishing *Flewster v Role* (1808) 1 Camp 187); *Danby v Beardsley* (1880) 43 LT 603. The mere signing of the charge sheet at the police station is not evidence sufficient to support a claim of false imprisonment against the person who signs it: *Grinham v Willey* (1859) 4 H & N 496; *Sewell v National Telephone Co Ltd* [1907] 1 KB 557, CA; but see *Harris v Dignum* (1859) 29 LJ Ex 23 (signing the charge sheet strong evidence of active participation in arrest); *Clubb v Wimpey & Co Ltd* [1936] 1 All ER 69 (on appeal [1936] 3 All ER 148, CA); and cf *Austin v Dowling* (1870) LR 5 CP 534. It is no defence that a person acts with no wrong motive or does not know that the arrest is unlawful: *Pike v Waldrum and Peninsular and Oriental Steam Navigation Co* [1952] 1 Lloyd's Rep 431.

7 See the Police and Criminal Evidence Act 1984 s 28; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 931. As to the common law, which applies to a breach of the peace, see *Christie v Leachinsky* [1947] AC 573, [1947] 1 All ER 567, HL. Failure to inform of the reason for arrest does not render the arrest itself unlawful, and the detention is only unlawful from the time when information could have been given: *DPP v Hawkins* [1988] 3 All ER 673, [1988] 1 WLR 1166, DC. Detention becomes lawful as soon as information concerning the reason for the arrest is given: *Lewis v Chief Constable of South Wales Constabulary* [1991] 1 All ER 206, CA. As to the specificity of the information required see *Abbassy v Metropolitan Police Comr* [1990] 1 All ER 193, [1990] 1 WLR 385, CA.

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#### **545. Arrest by a police constable.**

A police constable has much wider powers of arrest than a private person<sup>1</sup>. In particular, statute authorises a constable to make an arrest with or without a warrant in prescribed circumstances<sup>2</sup>. If the power of arrest is conditional on the officer having reasonable grounds for suspicion of a certain matter, this depends on the information actually in the possession of the arresting officer, and it does not avail him to say that his superiors probably had other information justifying arrest of which he was unaware; the mere fact that an arresting officer has been instructed by a superior to effect the arrest is not capable of amounting to reasonable grounds for the necessary suspicion<sup>3</sup>. A constable is liable in false imprisonment if he unlawfully arrests or detains another in circumstances which do not amount to a valid arrest<sup>4</sup>. He is also liable if he makes a lawful arrest but does not comply with the conditions for continued detention<sup>5</sup>, or if he detains the person for an unreasonable time without taking him before a magistrate<sup>6</sup>. A police constable acting in obedience to a warrant issued by a justice of the peace is not liable to be sued for false imprisonment unless he fails to comply with a written demand for a sight of and an opportunity to copy the warrant<sup>7</sup>.

1 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 924 et seq; **POLICE** vol 36(1) (2007 Reissue) PARA 428. As to the meaning of 'arrest' see *Murray v Ministry of Defence* [1988] 2 All ER 521, [1988] 1 WLR 692, HL (restraint of person who knew that she was being restrained amounted to arrest despite the absence of formal words); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 910. Reasonable force may be used: see the Police and Criminal Evidence Act 1984 s 117; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 857. What is reasonable is a question of fact: see *Farrell v Secretary of State for Defence* [1980] 1 All ER 166, [1980] 1 WLR 172, HL.

2 As to the execution of a warrant see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 920. As to arrest without a warrant see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 924 et seq. As to the common law power to detain persons to prevent a breach of the peace, and the extent to which such detention may be justified under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 5, see *Austin v Metropolitan Police Comr* [2007] EWCA Civ 989, [2008] QB 660, [2008] 1 All ER 564, CA; affd [2009] UKHL 5, [2009] 1 AC 564, [2009] 3 All ER 455.

3 *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 293-294, [1997] 1 All ER 129 at 134-135, per Lord Steyn; *Raissi v Metropolitan Police Comr* [2008] EWCA Civ 1237, [2009] QB 564, [2009] 3 All ER 14. If an officer who briefs the arresting officer omits to pass on relevant material, he cannot be liable for false imprisonment by reason of wrongful arrest as he has not made the arrest, and the arresting officer will not be so liable so long as he had reasonable grounds for suspecting that the person arrested has committed an offence: *Alford v Chief Constable of Cambridgeshire Police* [2009] EWCA Civ 100, [2009] All ER (D) 232 (Feb). As to reasonable suspicion see also *Hussien v Chong Fook Kam* [1970] AC 942 at 948-949, [1969] 3 All ER 1626 at 1631, PC.

4 See *Wright v Court* (1825) 4 B & C 596; *Raissi v Metropolitan Police Comr* [2008] EWCA Civ 1237, [2009] QB 564, [2009] 3 All ER 14. As to unlawfulness in the exercise of the discretion whether or not to arrest see *Holgate-Mohammed v Duke* [1984] AC 437, [1984] 1 All ER 1054, HL. See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 135. As to giving the reason for arrest see PARA 544 text and note 7.

5 *Roberts v Chief Constable of Cheshire* [1999] 2 All ER 326, [1999] 1 WLR 662 (failure to review detention; immaterial that circumstances existed that would have justified continued detention had the review taken place).

6 See *Wright v Court* (1825) 4 B & C 596. See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 135. But see *Dallison v Caffery* [1965] 1 QB 348, [1964] 2 All ER 610, CA (reasonable length of detention allowed for inquiries to be made).

7 See the Constables Protection Act 1750 s 6; and **POLICE** vol 36(1) (2007 Reissue) PARA 540. The constable is not protected if he executes a lawful warrant in an unlawful way (*Horsfield v Brown* [1932] 1 KB 355; such unlawfulness may possibly arise from abuse of a discretion relating to the manner of execution: *Henderson v Chief Constable of Cleveland Police* [2001] EWCA Civ 335, [2001] 1 WLR 1103, [2001] All ER (D) 351 (Feb)) or against the wrong person (*Aaron v Alexander* (1840) 1 M & G 775, cited approvingly in *McGrath v Chief Constable of the Royal Ulster Constabulary* [2001] UKHL 39, [2001] 2 AC 731, [2001] 4 All ER 334).

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#### 546. Governor of a prison.

The governor of a prison is protected in obeying a warrant of commitment that is valid on its face and addressed to him, and is not liable to a claim for false imprisonment if he detains a person in pursuance of the warrant<sup>1</sup>, even if in breach of the Prison Rules he places him in solitary confinement<sup>2</sup>. However, he is liable even if he acts in good faith and without negligence if he detains the wrong person<sup>3</sup>, or keeps a prisoner in custody without a sufficient warrant of commitment<sup>4</sup> or for a longer time than is lawful<sup>5</sup>.

It is no defence that in doing any such unlawful act the governor of a prison was obeying the order of a Secretary of State; if such orders are invalid, the Secretary of State who issued them is also liable to a claim for false imprisonment<sup>6</sup>.

1 *Greaves v Keene* (1879) 4 ExD 73; *Henderson v Preston* (1888) 21 QBD 362, CA. No claim for breach of statutory duty in relation to the nature of confinement is available to prisoners, although there may be a claim in negligence in respect of injury to health sustained as a result of intolerable conditions: *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL.

2 *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL. See further PARA 542. In such a case, the prisoner's loss of residual liberty may however constitute damage for the purposes of establishing liability in the tort of misfeasance in public office: *Karagozlu v Metropolitan Police Comr* [2006] EWCA Civ 1691, [2007] 2 All ER 1055, [2007] 1 WLR 1881. As to misfeasance in public office see PARA 719. It was once considered arguable that a prisoner may have a claim for extra confinement within the prison against police officers to whose industrial action the extra confinement was attributable (see *Toumia v Evans* (1999) Times, 1 April, CA), but this has been rejected (see *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312, [2009] All ER (D) 55 (Dec)). See further **PRISONS** vol 36(2) (Reissue) PARA 523.

Cases such as *Cobbett v Grey* (1850) 4 Exch 729 and *Osborne v Milman* (1886) 17 QBD 514 (revsd on another point (1887) 18 QBD 471, CA), which turn on the former allocation by statute of different classes of prisoners to different parts of the prison, are no longer good authority in this context: see *Arbon v Anderson* [1943] KB 252 at 254-255, [1943] 1 All ER 154 at 156 per Goddard LJ; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 119-120, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1990] 3 All ER 687 at 704, CA, per Taylor LJ; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 175, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733 at 754, HL, per Lord Jauncey of Tullichettle. Cf unlawfully removing the prisoner to another place: *Bint v Lavender* (1825) 1 C & P 659.

3 *Aaron v Alexander* (1811) 3 Camp 35. See also **PRISONS** vol 36(2) (Reissue) PARA 523.

4 *Demer v Cook* (1903) 88 LT 629. See also **PRISONS** vol 36(2) (Reissue) PARA 523.

5 *Withers v Henley* (1614) Cro Jac 379; *Moone v Rose* (1869) LR 4 QB 486; *Mee v Cruickshank* (1902) 86 LT 708; *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19, [2000] 4 All ER 15, HL (governor liable where he calculated release date in accordance with explanation of law in previous judicial decisions subsequently overruled). Cf *Olutu v Home Office* [1997] 1 All ER 385, [1997] 1 WLR 328, CA (warrant valid on its face even though proper term of detention exceeded). The police owe a duty of care to a prisoner to report accurately to the prison authorities the date of his arrest so that the proper term may be calculated: *Clarke v Chief Constable, Northamptonshire* [1999] Prison LR 59, (1999) Times, 14 June, CA. A prisoner who is on trial is in the legal custody of the governor of the prison from which he comes to the court or from which he would have come if he had not been bailed; if a prisoner is tried and acquitted and is afterwards unlawfully detained in the precincts of the court by the warders of the prison, the governor of the prison is liable to a claim for false imprisonment, even though he was not present in court and did not direct the illegal detention and even though the warders are not his employees: *Mee v Cruickshank* (1902) 86 LT 708. See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1345; **PRISONS** vol 36(2) (Reissue) PARAS 523, 539.

6 *Cobbett v Grey* (1850) 4 Exch 729. As to the liability of the Secretary of State see *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58, sub nom *Hague v Deputy Governor of Parkhurst Prison* [1991] 3 All ER 733, HL; cf *Racz v Home Office* [1994] 2 AC 45, [1994] 1 All ER 97, HL.

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#### 547. Magistrate.

A magistrate or other person acting in a judicial capacity is not liable for acts done within his jurisdiction<sup>1</sup>, but he is liable to a claim for false imprisonment if he unlawfully commits a person to prison in a matter in which he has no jurisdiction if he acts in bad faith<sup>2</sup>.

1 As to judicial privilege see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARAS 197-203; and **MAGISTRATES**.

2 See the Courts Act 2003 ss 31, 32; and **MAGISTRATES**. See also **JUDICIAL REVIEW** vol 61 (2010) PARA 621.

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#### 548. Ministerial officer.

A ministerial officer who acts under the orders of a person in a judicial capacity is not liable to a claim for false imprisonment merely because he signs an unlawful warrant issued by a person acting in a judicial capacity<sup>1</sup>. A solicitor is not entitled to rely on the issue of a warrant of arrest which is defective as being a judicial act if he makes that act his own, as by personally directing or taking part in the execution of the warrant<sup>2</sup>.

1 At common law see *Dews v Riley* (1851) 11 CB 434 (clerk of county court); *Demer v Cook* (1903) 88 LT 629 (clerk of the peace); cf *Andrews v Marris* (1841) 1 QB 3 (clerk liable for improper exercise of judicial function). Under statute, no action lies against a justice's clerk in respect of what he does or omits to do in the execution of this duty in relation to a matter within his jurisdiction, and an action lies in respect of such acts or omissions in relation to a matter not within his jurisdiction only if it is proved that he acted in bad faith: see the Courts Act 2003 ss 31(2), 32(2). As to acts pursuant to judicial orders generally see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 206.

2 *Barker v Braham and Norwood* (1773) 2 Wm Bl 866; *Codrington v Lloyd* (1838) 8 Ad & EL 449; *Green v Elgie* (1843) 5 QB 99. Cf *Cooper v Harding* (1845) 7 QB 928; *Williams v Smith* (1863) 14 CBNS 596; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 876. As to the distinction between false imprisonment and malicious prosecution see PARA 543.

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#### **549. The armed forces.**

A claim will not lie for the detention of a member of the naval, military or air forces of the Crown if the detention is justified by naval, military or air force law<sup>1</sup>. However, where the detention is illegal a claim will lie against a member of the forces responsible for the detention, even if he is acting under the order of his superiors<sup>2</sup>.

1 See **ARMED FORCES**.

2 See **ARMED FORCES**.

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#### **550. Master of a ship.**

A claim will not lie against the master of a ship for the arrest or confinement of a person on board in the proper exercise of his disciplinary powers<sup>1</sup>.

1 See the Merchant Shipping Act 1995 s 105; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 447. See also PARA 536.

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#### **551. Parent or schoolteacher.**

A parent, or a schoolteacher to whose care the parent has entrusted a child, may be able to confine a child in a reasonable manner and for sufficient reason<sup>1</sup>.

1 See **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARA 134; **EDUCATION** vol 15(1) (2006 Reissue) PARA 578. Cf *R v Rahman* (1985) 81 Cr App Rep 349, CA (criminal liability). However, the human rights of the person detained must now be considered: see the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

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## 552. Mentally disordered persons.

A person suffering from mental disorder may be detained in a hospital in pursuance of an application for admission for treatment or assessment, a hospital order, or a direction made under the mental health legislation<sup>1</sup>.

1 See the Mental Health Act 1983 ss 2-4, 11-15, 56-58, 139(1), (2); and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 460 et seq. Approved mental health professionals, hospital staff, police and persons authorised in writing by the hospital managers may take into custody and return to a hospital or approved place detained patients absent without leave: see s 18; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 507. Although these patients are unlawfully at large, police cannot enter premises to arrest them except in the course of pursuit (see the Police and Criminal Evidence Act 1984 s 17(1)(d); *D'Souza v DPP* [1992] 4 All ER 545, [1992] 1 WLR 1073, HL (the pursuit must be contemporaneous or almost contemporaneous with the entry into the premises); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 884), the proper course being to apply for a warrant (ie under the Mental Health Act 1983 s 135(2): see **MENTAL HEALTH** vol 30(2) (Reissue) PARA 549). However, a constable may enter premises to save life or limb or prevent serious damage to property: see the Police and Criminal Evidence Act 1984 s 17(1)(e); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 884. A constable who finds a mentally disordered person in a public place and in need of immediate care and control may take him to a place of safety: see the Mental Health Act 1983 s 136; and **MENTAL HEALTH** vol 30(2) (Reissue) PARA 550. The defences of self-defence and necessity may be available.

The guardian of a minor under 16 may authorise his admission for assessment without full procedures where the child was not competent to consent to or reject his own treatment: *R v Kirklees Metropolitan Borough Council, ex p C* [1992] 2 FCR 321, [1992] 2 FLR 117.

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## (B) DEFENCES

### 553. Justification.

The defendant in a claim for false imprisonment is entitled to succeed if he pleads and proves that the imprisonment was legally justified<sup>1</sup>. A mistaken belief that a legal power of imprisonment exists does not afford a legal justification, even if the belief is reasonable<sup>2</sup>, but a defendant acting with lawful authority may still plead justification even if the warrant or provision under which he acts is subsequently found to have been invalid or liable to be set aside<sup>3</sup>.

If one person arrests another without a warrant, he must normally inform the person arrested of the reason why he is arrested, that is, in substance, of the act for which he is arrested,

unless the reason is apparent from the circumstances as where he is caught red-handed and his crime is patent; if the person making the arrest fails to do this, he cannot plead that the arrest was justified on a ground not disclosed to the person arrested until later<sup>4</sup>.

1 See PARA 544 et seq. Statutory powers of arrest and detention may also be granted to other persons, eg immigration officers: see the Immigration Act 1971 ss 4(2)(d), 28A, Sch 2 paras 16-20; and **BRITISH NATIONALITY, IMMIGRATION AND ASYLUM** vol 4(2) (2002 Reissue) PARAS 156, 206. See also *R (on the application of Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 4 All ER 785, [2002] 1 WLR 3131, HL; *D v Home Office* [2005] EWCA Civ 38, [2006] 1 All ER 183, [2006] 1 WLR 1003 (no immunity for good faith acts).

2 *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2001] 2 AC 19, [2000] 4 All ER 15, HL.

3 *Percy v Hall* [1997] QB 924, [1996] 4 All ER 523, CA (invalid byelaw); *McGrath v Chief Constable of the Royal Ulster Constabulary* [2001] UKHL 39, [2001] 2 AC 731, [2001] 4 All ER 334 (arrest warrant made out in wrong name); *Olutu v Home Office* [1997] 1 All ER 385, [1997] 1 WLR 328, CA; *Quinland v Governor of Swaleside Prison* [2002] EWCA Civ 174, [2003] QB 306, [2003] 1 All ER 1173 (both involving a calculation error in a warrant of commitment).

4 See PARA 544 note 7.

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## (C) REMEDIES

### 554. In general.

If a person is unlawfully imprisoned, he may use force to release himself<sup>1</sup>. He may also obtain his release by an application made on his behalf for a writ of habeas corpus<sup>2</sup>.

False imprisonment is a tort actionable without proof of damage and is also an indictable offence, even if no violence is used<sup>3</sup>.

1 *Rowe v Hawkins* (1858) 1 F & F 91. This is not so if, though the initial arrest was unlawful, the subsequent custody was lawful: *DPP v L* (1999) Times, 1 February, DC.

2 See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 207 et seq.

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 135.

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### 555. Damages.

In a claim for false imprisonment the claimant is entitled to recover general damages for the imprisonment and any physical or mental injury which results directly from it<sup>1</sup>. Damages for the loss of liberty itself should reflect the length of the unlawful detention, but should be awarded on a progressively reducing scale, as the claimant is entitled to a higher rate of compensation for the initial shock of being arrested<sup>2</sup>. The claimant may also recover, by way of special damages<sup>3</sup>, compensation for any consequential loss which he has incurred<sup>4</sup>. A separate award

may be made for aggravated damages where, in view of the circumstances attending the imprisonment and/or the conduct of the defendant at the time of or before or after the imprisonment, the basic award for loss of liberty would not be sufficient compensation<sup>5</sup>. A false imprisonment does not merely affect a person's liberty but also his reputation, and the damage to reputation continues until it is caused to cease by an avowal that the imprisonment was false<sup>6</sup>. In an appropriate case, exemplary damages may also be awarded<sup>7</sup>. Provocation by the claimant may serve to negative the award of aggravated damages (but not to reduce the basic compensatory damages)<sup>8</sup>.

Statutory compensation, calculated on the basis of principles analogous to those governing the assessment of damages for false imprisonment and other relevant civil wrongs<sup>9</sup>, may be paid where a person has been convicted of a criminal offence and his conviction is subsequently reversed or where he is pardoned on the ground that a new or newly discovered fact shows that there has been a miscarriage of justice<sup>10</sup>.

1 As to general damages see **DAMAGES** vol 12(1) (Reissue) PARAS 812, 940.

2 *Thompson v Metropolitan Police Comr* [1998] QB 498 at 515, [1997] 2 All ER 762 at 774, CA, per Lord Woolf MR, suggesting a guideline figure in straightforward cases of £500 for the first hour and £3,000 for 24 hours; these figures must be adjusted for the effects of inflation: *Thompson v Metropolitan Police Comr* [1998] QB 498 at 515 at 517, [1997] 2 All ER 762 at 776, CA.

3 As to special damages see **DAMAGES** vol 12(1) (Reissue) PARA 812.

4 See **DAMAGES** vol 12(1) (Reissue) PARAS 851, 853. In principle, it seems that an intentional wrongdoer should be liable for all the direct consequences of the wrong: see *Quinn v Leathem* [1901] AC 495 at 537, HL, per Lord Lindley; *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 279-280, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 789, HL, per Lord Steyn. All the decided cases in fact apply the test of whether the loss is a direct consequence of the trespass (see *Clark v Woods* (1848) 2 Exch 395 (money paid under illegal process to secure release from gaol); *Foxall v Barnett* (1853) 2 E & B 928 (costs of proceedings to quash coroner's inquisition); *De Mesnil v Dakin* (1867) LR 3 QB 18; *Norton v Monckton* (1895) 43 WR 350 (money paid under illegal process to secure release from gaol); *Childs v Lewis* (1924) 40 TLR 870 (loss of directorship due to arrest on false charge)). Consequential damage was found to be too remote in *Harnett v Bond* [1925] AC 669, HL (false accusation of lunacy followed by detention for nine years); *Boyce v Bayliffe* (1807) 1 Camp 58 (cost of return travel by alternative means after imprisonment by master of ship on outward journey); *Hoey v Felton* (1861) 11 CBNS 142 (loss of prospective job). It has yet to be authoritatively determined that the concept of foreseeability established by *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388, [1961] 1 All ER 404, PC, has no application in false imprisonment.

5 See *Thompson v Metropolitan Police Comr* [1998] QB 498 at 516, [1997] 2 All ER 762 at 775, CA, per Lord Woolf MR; *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065. Amongst older cases see *Edgell v Francis* (1840) 1 Man & G 222. See also **DAMAGES** vol 12(1) (Reissue) PARAS 940, 1111, 1114.

6 *Walter v Alltools Ltd* (1944) 61 TLR 39 at 40, (1944) 171 LT 371 at 372, CA, per Lawrence LJ; followed in *Hook v Cunard Steamship Co Ltd* [1953] 1 All ER 1021, [1953] 1 WLR 682; *Lunt v Liverpool City Justices* (5 March 1991, unreported), CA. A plea of justification may similarly serve to continue the damage to reputation so, if it is afterwards abandoned, it may properly be taken into account in estimating the damages: *Warwick v Foulkes* (1844) 12 M & W 507.

7 See *Thompson v Metropolitan Police Comr* [1998] QB 498 at 516-517, [1997] 2 All ER 762 at 775-776, CA, per Lord Woolf MR; *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065. Amongst older cases see *Huckle v Money* (1763) 2 Wils 205. See also **DAMAGES** vol 12(1) (Reissue) PARAS 1114-1119.

8 *Lane v Holloway* [1968] 1 QB 379, [1967] 3 All ER 129, CA.

9 *R (on the application of O'Brien) v Independent Assessor* [2004] EWCA Civ 1035, [2005] PIQR Q7.

10 See the Criminal Justice Act 1988 s 133; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2055.



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## (ii) The Rule in *Wilkinson v Downton*

### 556. The rule in *Wilkinson v Downton*.

A wilful act or statement of the defendant, calculated to cause physical harm to the claimant and which in fact causes physical harm to him, is a tort<sup>1</sup>. Thus a person is liable if he makes a false statement to the claimant who, as a result, suffers nervous shock and consequently physical illness<sup>2</sup>. A person who indirectly inflicts intentional harm on another does not commit a trespass, but there seems no reason why this tort should not apply to any type of physical harm, whether caused by an act or a statement, provided that the harm, although an indirect consequence, is calculated<sup>3</sup> to result from the defendant's conduct<sup>4</sup>. In the absence of physical harm, it appears on the current state of the authorities that the claimant must have suffered a recognised psychiatric condition, and not merely anxiety or distress<sup>5</sup>.

1 *Wilkinson v Downton* [1897] 2 QB 57 at 58-59 per Wright J.

2 See *Wilkinson v Downton* [1897] 2 QB 57, where the defendant falsely told the plaintiff that her husband was seriously injured in an accident, and she, believing this, suffered nervous shock resulting in physical illness; *Janvier v Sweeney* [1919] 2 KB 316, CA, where private detectives were held liable to the plaintiff for causing her nervous shock by falsely telling her that unless she procured letters for them from her mistress, they would inform the authorities that her fiancé was a traitor. It is no defence that the statement was made as a joke: *Wilkinson v Downton* [1897] 2 QB 57.

3 In *Wainwright v Home Office* [2003] UKHL 53 at [44], [2004] 2 AC 406 at [44], [2003] 4 All ER 969 at [44], Lord Hoffmann observed that Wright J in *Wilkinson v Downton* [1897] 2 QB 57 had wanted to water down the concept of intention as much as possible and had therefore devised a concept of imputed intention. In Lord Hoffmann's view, imputed intention would be insufficient if the liability were to be extended to cases of mere distress: *Wainwright v Home Office* [2003] UKHL 53 at [44], [2004] 2 AC 406 at [44], [2003] 4 All ER 969 at [44]; and see note 5.

4 The terms in which Wright J expressed the principle in *Wilkinson v Downton* [1897] 2 QB 57 at 58-59 (see the text and note 1) are plainly wide enough to cover such circumstances. See *Burnett v George* [1993] 1 FCR 1012, [1992] 1 FLR 525; *Khorasandjian v Bush* [1993] QB 727, [1993] 3 All ER 669, CA (overruled by *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL) (both cases involving harassment by means of telephone calls calculated to do the plaintiff harm). As to harassment see now the Protection from Harassment Act 1997; PARA 557; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 152.

The principle in *Wilkinson v Downton* [1897] 2 QB 57 also covers excessive and unlawful means of protecting property by retributive dangers such as man traps and spring guns (*Deane v Clayton* (1817) 7 Taunt 489; *Bird v Holbrook* (1828) 4 Bing 628; and see *Ilott v Wilkes* (1820) 3 B & Ald 304), in so far as these are not covered by the Occupiers' Liability Act 1984 (see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 476; **NEGLIGENCE** vol 78 (2010) PARA 40) and the common law duty of common humanity owed to trespassers under *Herrington v British Railways Board* [1972] AC 877, [1972] 1 All ER 749, HL (see PARA 443).

5 See *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932, CA. However, the point may not yet be finally settled: see *Hunter v Canary Wharf Ltd* [1997] AC 655 at 707, [1997] 2 All ER 426 at 452, HL, per Lord Hoffmann; *Wainwright v Home Office* [2003] UKHL 53 at [46], [2004] 2 AC 406 at [46], [2003] 4 All ER 969 at [46] per Lord Hoffmann. Liability for anxiety or distress alone may arise under the Protection from Harassment Act 1997, but this applies only where there is a course of conduct (see PARA 557).

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### (iii) Harassment

#### 557. Civil claims for harassment.

A person must not pursue a course of conduct<sup>1</sup> which amounts to harassment of another<sup>2</sup> and which he knows or ought to know amounts to harassment of the other<sup>3</sup>.

A person must not pursue a course of conduct which involves harassment of two or more persons and which he knows or ought to know involves harassment of those persons, and by which he intends to persuade any person (whether or not one of those mentioned above) either not to do something that he is entitled or required to do, or to do something that he is not under any obligation to do<sup>4</sup>.

An actual or apprehended breach of the prohibition of conduct amounting to harassment<sup>5</sup> may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question<sup>6</sup>; and on such a claim damages may be awarded for (among other things) any anxiety caused by, and any financial loss resulting from, the harassment<sup>7</sup>. Where there is an actual or apprehended breach by any person (the 'relevant person') of the prohibition of conduct involving harassment of two or more persons<sup>8</sup>, any person who is or may be the victim of the course of conduct in question, or any person who is or may be a person whom the course of conduct is intended to persuade, may apply to the High Court or a county court for an injunction restraining the relevant person from pursuing any conduct which amounts to harassment in relation to any person or persons mentioned or described in the injunction<sup>9</sup>.

Where the High Court or a county court grants an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment<sup>10</sup>, the claimant may, if he considers that the defendant has done anything which he is prohibited from doing by the injunction<sup>11</sup>, apply for the issue of a warrant for the defendant's arrest<sup>12</sup>. A warrant may only be issued if the application is substantiated on oath, and the judge or district judge has reasonable grounds for believing that the defendant has done anything which he is prohibited from doing by the injunction<sup>13</sup>.

If an injunction is granted<sup>14</sup> and without reasonable excuse the defendant does anything which he is prohibited from doing by the injunction, he is guilty of an offence<sup>15</sup>.

1 A 'course of conduct' must involve conduct on at least two occasions: Protection from Harassment Act 1997 s 7(1), (3) (s 7(1) amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 44; Protection from Harassment Act 1997 s 7(3) substituted by the Serious Organised Crime and Police Act 2005 s 125(1), (7)(a)). Each incident must be of sufficient gravity to constitute harassment; it is not enough that the incidents amount to harassment only by virtue of their cumulative effect: see *Conn v Sunderland City Council* [2007] EWCA Civ 1492, [2008] IRLR 324, [2007] All ER ((D) 99 (Nov)).

'Conduct' includes speech: Protection from Harassment Act 1997 s 7(4). As to the printed word see *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 78, [2001] All ER (D) 246 (Jul). 'Conduct' also includes computer-generated correspondence, because real people are responsible for programming and entering material into the computer: see *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, [2009] 3 All ER 304, [2009] All ER (D) 80 (Feb).

2 Protection from Harassment Act 1997 s 1(1)(a). References to harassing a person include alarming the person or causing the person distress: s 7(2). 'Harassment' is not otherwise defined in the Act, but it has been held to require misconduct of such gravity as would sustain criminal liability under the Act; merely annoying, aggravating, unattractive, unreasonable or regrettable conduct is not enough but conduct which is oppressive and unacceptable (eg stalking) will suffice. See *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 78, [2001] All ER (D) 246 (Jul); *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34 at [30], [2007] 1 AC 224 at [30], [2006] 4 All ER 395 at [30] per Lord Nicholls of Birkenhead, and at [66] per Baroness Hale of Richmond; *Conn v Sunderland City Council* [2007] EWCA Civ 1492, [2008] IRLR 324, [2007] All ER (D) 99 (Nov); *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, [2009] 3 All ER 304, [2009] All ER (D) 80 (Feb).

The Protection from Harassment Act 1997 has been construed as concerned only with harassment of an individual and not harassment of a corporate entity: see *DPP v Dziurzynski* [2002] EWHC 1380 (Admin), (2002) Times, 8 July, [2002] All ER (D) 258 (Jun); *Daichi Pharmaceuticals UK Ltd v Stop Huntingdon Animal Cruelty* [2003] EWHC 2337 (QB), [2004] 1 WLR 1503, [2005] 1 BCLC 27.

3 Protection from Harassment Act 1997 s 1(1)(b). For these purposes, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other: s 1(2).

Section 1(1) or (1A) (see text and note 4) does not apply to a course of conduct if the person who pursued it shows (s 1(3) (amended by the Serious Organised Crime and Police Act 2005 s 125(1), (2)(c)):

- 1 (1) that it was pursued for the purpose of preventing or detecting crime (Protection from Harassment Act 1997 s 1(3)(a));
- 2 (2) that it was pursued under any enactment or rule of law to comply with any condition or requirement imposed by any person under any enactment (s 1(3)(b));
- 3 (3) that in the particular circumstances the pursuit of the course of conduct was reasonable (s 1(3)(c)).

A person who pursues a course of conduct in breach of s 1(1) or (1A) is guilty of an offence: see s 2 (amended by the Police Reform Act 2002 s 107(2), Sch 8; and the Serious Organised Crime and Police Act 2005 s 125(1), (3)); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 152.

The Protection from Harassment Act 1997 is not intended to restrict rights to demonstrate and protest on matters of public interest: see *Huntingdon Life Sciences Ltd v Curtin* (1997) Times, 11 December; *DPP v Dziurzynski* [2002] EWHC 1380 (Admin) at [33], (2002) Times, 8 July at [33], [2002] All ER (D) 258 (Jun) at [33] per Rose LJ.

4 Protection from Harassment Act 1997 s 1(1A) (added by the Serious Organised Crime and Police Act 2005 s 125(1), (2)(a)). For these purposes, the person whose course of conduct is in question ought to know that it involves harassment of another if a reasonable person in possession of the same information would think the course of conduct involved harassment of the other: Protection from Harassment Act 1997 s 1(2) (amended by the Serious Organised Crime and Police Act 2005 s 125(1), (2)(b)).

5 I.e. the Protection from Harassment Act 1997 s 1(1).

6 Protection from Harassment Act 1997 s 3(1).

7 Protection from Harassment Act 1997 s 3(2). The special time limit for claims in respect of personal injuries (see the Limitation Act 1980 s 11; and PARA 481) does not apply to any claim for damages brought under these provisions: s 11(1A) (added by the Protection from Harassment Act 1997 s 6).

8 I.e. the Protection from Harassment Act 1997 s 1(1A).

9 Protection from Harassment Act 1997 s 3A(1), (2) (s 3A added by the Serious Organised Crime and Police Act 2005 s 125(1), (5)).

10 See the Protection from Harassment Act 1997 s 3(3)(a).

11 See the Protection from Harassment Act 1997 s 3(3)(b).

12 See the Protection from Harassment Act 1997 ss 3(3), 3A(3) (s 3A as added: see note 9). An application may be made, where the injunction was granted by the High Court, to a judge of that court, and where the injunction was granted by a county court, to a judge or district judge of that or any other county court: ss 3(4), 3A(3) (s 3A as so added).

13 Protection from Harassment Act 1997 ss 3(5), 3A(3) (s 3A as added: see note 9).

14 I.e. for the purpose mentioned in the Protection from Harassment Act 1997 s 3(3)(a) (see the text and note 10).

15 Protection from Harassment Act 1997 ss 3(6), 3A(3) (s 3A as added: see note 9). A person guilty of such an offence is liable on conviction on indictment to imprisonment for a term not exceeding five years, or a fine, or both, or on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both: ss 3(9), 3A(3) (s 3A as so added). As to the statutory maximum see **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140.

Where a person is convicted of an offence under s 3(6) in respect of any conduct, that conduct is not punishable as a contempt of court (ss 3(7), 3A(3) (s 3A as so added)), and a person cannot be convicted of an offence under s 3(6) in respect of any conduct which has been punished as a contempt of court (ss 3(8), 3A(3) (s 3A as so added)).

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## **(2) TORTS TO REPUTATION AND PRIVACY**

### **(i) Libel and Slander**

#### **558. In general.**

Every person is entitled to his good name and to the esteem in which he is held by others, and has a right to claim that his reputation will not be disparaged by defamatory statements made about him to a third person without lawful justification or excuse<sup>1</sup>. If the defamatory statement is made in writing or some other permanent form the tort of libel is committed and the law presumes damage. If the defamation is oral, or in some other transient form, it constitutes the tort of slander, which is not actionable without proof of special damage except where the statement is of a particular character.

<sup>1</sup> As to defamation generally see **LIBEL AND SLANDER**.

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#### **559. What the claimant has to prove.**

In order to establish a prima facie case in a claim for libel or slander it is necessary for the claimant to prove that the words complained of were published of him<sup>1</sup>, were defamatory of him<sup>2</sup> and were published by the defendant in circumstances in which the defendant is responsible for the publication<sup>3</sup>.

<sup>1</sup> As to the requirement of reference to the claimant see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 39-41.

<sup>2</sup> As to defamatory statements see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 39-59.

<sup>3</sup> As to publication of defamatory matter see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 60-81.

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#### **560. Defences to libel and slander claims.**

The main defences to a claim for libel or slander are:

- 24 (1) justification, that is, that the words are true<sup>1</sup>;
- 25 (2) fair comment on a matter of public interest<sup>2</sup>;
- 26 (3) absolute privilege<sup>3</sup>;
- 27 (4) qualified privilege<sup>4</sup>;
- 28 (5) an offer of amends under statutory provisions<sup>5</sup>;
- 29 (6) leave and licence<sup>6</sup>;
- 30 (7) innocent dissemination<sup>7</sup>; and
- 31 (8) apology and payment into court<sup>8</sup>.

1 As to justification see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 82-93.

2 As to fair comment see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 135-148.

3 As to absolute privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 94-108.

4 As to qualified privilege see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 109-134.

5 See under the Defamation Act 1996 ss 2-4. As to offers of amends see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 160-164.

6 As to leave and licence see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 165-166.

7 As to innocent dissemination see **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 157-159.

8 As to apologies and payments into court see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 164.

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## **(ii) Invasion of Privacy**

### **561. Invasion of privacy.**

There is no general tort of invasion of privacy<sup>1</sup>, but it is now established that it is a tort to disclose private information concerning a natural person without lawful authority<sup>2</sup>.

It should also be noted that a number of other torts may serve to protect personal privacy in particular circumstances<sup>3</sup>. The constant surveillance of the claimant's house, accompanied by the photographing of his every activity, may constitute a private nuisance<sup>4</sup>. If a newspaper maliciously publishes information about a person's distant criminal past a claim in defamation may be brought<sup>5</sup>. It is a trespass to enter a person's home without permission<sup>6</sup>. If a photographer sells to the press a copy of a photograph of someone who is now an object of public interest he might be sued for infringement of copyright<sup>7</sup>. Persistent harassment by telephone calls could amount to an actionable nuisance<sup>8</sup>.

1 See *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406, [2003] 4 All ER 969. As to the protection of the privacy of natural persons under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) art 8 and the Human Rights Act 1998 see PARA 721. Under other statutes, protection of privacy may extend to bodies corporate: see *R v Broadcasting Standards Commission, ex p British Broadcasting Corp'n* [2001] QB 885, [2000] 3 All ER 989, CA.

2 See *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 All ER 289, CA; *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [2002] 2 All ER 545; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995;

*McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, [2007] EMLR 113; *HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776, [2008] Ch 57, [2007] 2 All ER 139.

3 See eg *Kaye v Robertson* [1991] FSR 62, (1990) Times, 21 March CA (remedy for injurious falsehood). As to statutory provisions relating to protection from harassment see PARA 557; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 152.

4 *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479 at 489, [1977] 2 All ER 902 at 909 per Griffiths J. However, a single flight over someone's land to take a photograph is not a trespass or a private nuisance or otherwise actionable: *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479 at 489, [1977] 2 All ER 902 at 909.

5 See the Rehabilitation of Offenders Act 1974 s 8; and **LIBEL AND SLANDER** vol 28 (Reissue) PARA 22.

6 As to trespass to land see PARA 562 et seq.

7 *Williams v Settle* [1960] 2 All ER 806, [1960] 1 WLR 1072, CA; *Nottinghamshire Healthcare NHS Trust v News Group Newspapers Ltd* [2002] EWHC 409 (Ch), [2002] RPC 962, [2002] EMLR 33. If the information in the photograph is private, there may also be a claim for wrongful disclosure of private information: see *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [2004] 2 All ER 995.

8 *Motherwell v Motherwell* (1976) 73 DLR (3d) 62, Alta App Div; *Khorasandjian v Bush* [1993] QB 727, [1993] 3 All ER 669, CA. But note that the claim must be brought by a person with an interest in the land affected: see **NUISANCE** vol 78 (2010) PARA 179. In such a case, a claim could also be brought under the Protection from Harassment Act 1977: see PARA 557.

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### **(3) TORTS TO LAND**

#### **(i) Trespass to Land**

##### **A. WHAT CONSTITUTES TRESPASS TO LAND**

###### **562. Unlawful presence.**

A person's unlawful presence on land in the possession<sup>1</sup> of another is a trespass for which a claim may be brought<sup>2</sup>, even though no actual damage is done<sup>3</sup>. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it<sup>4</sup> or takes possession of it<sup>5</sup>, or expels the person in possession<sup>6</sup>, or pulls down or destroys anything permanently fixed to it<sup>7</sup>, or wrongfully takes minerals from it<sup>8</sup>, or places or fixes anything on it<sup>9</sup> or in it<sup>10</sup>, or if he erects or suffers to continue on his own land anything which invades the airspace of another<sup>11</sup>. He also commits a trespass to land if, having entered lawfully, he unlawfully remains after his authority to be there expires<sup>12</sup>.

1 As to what constitutes possession see PARAS 573-574.

2 The claimant does not have to plead trespass to land specifically in his particulars of claim: see *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA.

3 See eg *Ashby v White* (1703) 2 Ld Raym 938 at 955 per Holt CJ; *Entick v Carrington* (1765) 19 State Tr 1029 at 1066; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA. As to trespass on the highway see *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL; *Harrison v Duke of Rutland* [1893] 1 QB 142, CA; *Hickman v Maisey* [1900] 1 QB 752, CA.

4 *Blundell v Catterall* (1821) 5 B & Ald 268 (crossing the seashore on foot or with bathing machine). See also *League Against Cruel Sports Ltd v Scott* [1986] QB 240, [1985] 2 All ER 489 (master of hounds liable for trespass when hounds entered prohibited land).

5 A squatter is a trespasser: *McPhail v Persons, names unknown* [1973] Ch 447 at 456, [1973] 3 All ER 393 at 396, CA, per Lord Denning MR.

6 *Murray v Hall* (1849) 7 CB 441 (expulsion of one tenant in common by another: see PARA 578; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 193); *Watson v Murray & Co* [1955] 2 QB 1, [1955] 1 All ER 350 (sheriff's officer executing writ of fieri facias excluding debtor from premises for purpose of holding sale there: see **SHERIFFS** vol 42 (Reissue) PARA 1135). As to unlawful eviction by a landlord see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 653 et seq.

7 *Lavender v Betts* [1942] 2 All ER 72 (landlord removing doors and windows). Cf action which does not involve a trespass, eg cutting off the gas and electricity supply: *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA; but see now the Protection from Eviction Act 1977 (see **LANDLORD AND TENANT**). For the measure of damages see also the Housing Act 1988 ss 27, 28; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 654-655.

8 See **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 31 et seq.

9 *Mace v Philcox* (1864) 15 CBNS 600 (placing a bathing machine on the seashore); *Leader v Moody* (1875) LR 20 Eq 145 (lessee making temporary structural alterations in a theatre); *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538, CA; *Kynoch Ltd v Rowlands* [1912] 1 Ch 527, CA (tipping refuse on land); *Gregory v Piper* (1829) 9 B & C 591 (rubbish against wall); *South Wales and Liverpool Steamship Co Ltd v Nevill's Dock and Rly Co Ltd* (1913) 18 Com Cas 124 (unlawful occupation of berth by a ship in a dock); *Westripp v Baldock* [1938] 2 All ER 779 (on appeal [1939] 1 All ER 279, CA) (placing of ladders and other articles against the wall of another). As to leaving objects on land see *Konskier v B Goodman Ltd* [1928] 1 KB 421, CA; *Hudson v Nicholson* (1839) 5 M & W 437.

10 *Schweder v Worthing Gas Light and Coke Co* [1912] 1 Ch 83 (gas pipes) (further proceedings in *Schweder v Worthing Gas Light and Coke Co (No 2)* [1913] 1 Ch 118); *Bocardo SA v Start Energy UK Onshore Ltd* [2009] EWCA Civ 579, [2010] 1 All ER 26, [2009] 2 P & CR 419 (oil pipeline at depths of 2,800 ft below the surface). In the latter case, the court found that it was not necessary to decide how much further into the earth's crust ownership may go: *Bocardo SA v Start Energy UK Onshore Ltd* [2009] EWCA Civ 579 at [60], [2010] 1 All ER 26 at [60], [2009] 2 P & CR 419 at [60] per Aikens LJ.

Exploding dynamite in a river is a trespass to the land of the riparian owner (*Marquis of Lansdowne v Kerry County Council* (1914) 48 ILT 58); so is the discharge of effluent through a sewer the construction of which is itself a trespass (*Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA).

11 *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343, where the invasion of the plaintiff's airspace by a projecting neon sign amounted to a trespass and not merely nuisance, applying *Gifford v Dent* [1926] WN 336. In *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343, McNair J concluded that *Pickering v Rudd* (1815) 4 Camp 219, where a board projecting over the plaintiff's land was held to be no trespass, was no longer good law. A landowner's right in the airspace extends only to such a height as is necessary for the ordinary use and enjoyment by him of his land and structures upon it: *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479, [1977] 2 All ER 902, approving *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343. See also *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411; *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments Ltd)* [1987] 2 EGLR 173, 38 BLR 82 (intrusions by tower crane); *Laiqat v Majid* [2005] EWHC 1305 (QB), [2005] 26 EG 130 (CS), [2005] All ER (D) 231 (Jun) (intrusion by extractor fan). As to trespass by aircraft see PARA 571.

12 See *Wood v Leadbitter* (1845) 13 M & W 838; and PARAS 565, 580. A licensee must be given reasonable time to leave the land on revocation of the licence: see *Robson v Hallett* [1967] 2 QB 939, [1967] 2 All ER 407, DC.

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### 563. Trespass and nuisance distinguished.

Where there is no act of direct intrusion on another person's property, liability in trespass does not arise, although liability may arise in nuisance<sup>1</sup>. If an occupier of land brings onto it anything which is not naturally there, and which is likely to do damage if it escapes, he keeps it at his peril and is liable in private nuisance for all the damage which is the natural consequence of its escape<sup>2</sup>. However, ordinary use of land does not give rise to liability to neighbouring owners or occupiers for such mischief as it may occasion them<sup>3</sup>.

1 As to the distinction between trespass and nuisance see *Southport Corpn v Esso Petroleum Co Ltd* [1953] 2 All ER 1204 at 1208, [1953] 3 WLR 773 at 776 per Devlin J; and **NUISANCE** vol 78 (2010) PARA 102. As to the elements of the tort of nuisance see **NUISANCE** vol 78 (2010) PARA 109 et seq. Damage is an essential element of the cause of action for nuisance (see **NUISANCE** vol 78 (2010) PARA 112 et seq) but not of the tort of trespass (see PARA 562).

Branches of trees or roots growing over or into another's land may give rise to a claim in nuisance, but not in trespass: *Lemmon v Webb* [1894] 3 Ch 1, CA (affd [1895] AC 1, HL); *Smith v Giddy* [1904] 2 KB 448; *Davey v Harrow Corpn* [1958] 1 QB 60, [1957] 2 All ER 305, CA; *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737.

As to a merely consequential, as opposed to a direct, injury (eg by allowing a structure to decay and fall on the claimant's land) see *Tenant v Goldwin* (1704) 2 Ld Raym 1089. See also *Mann v Saulnier* (1959) 19 DLR (2d) 130 (fence leaning because of decay a nuisance, not a trespass in air space). It has been held that it was trespass to allow faecal matter under the defendant's control to escape into a river in such a manner or under such conditions that it was carried, whether by the current or the wind, onto the plaintiff's land: see *Jones v Llanrwst UDC* [1911] 1 Ch 393 at 402 per Parker J. See also *Foster v Warblington UDC* [1906] 1 KB 648, CA; *Southport Corpn v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 204, [1954] 2 All ER 561 at 576, CA, per Morris LJ (approving *Jones v Llanrwst UDC* [1911] 1 Ch 393); but cf *Southport Corpn v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 195, [1954] 2 All ER 561 at 570, CA, per Denning LJ, holding on the facts that trespass would not lie because the damage was caused consequentially and not directly. See also the judgments in this case on appeal: *Esso Petroleum Co Ltd v Southport Corpn* [1956] AC 218 at 242, [1955] 3 All ER 864 at 872, HL, per Lord Radcliffe (distinguishing *Jones v Llanrwst UDC* [1911] 1 Ch 393), and at 244 and 873 per Lord Tucker (who inclined to agree with Denning LJ). See further *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] QB 339, [1987] 1 All ER 637 (doubt as to whether water forced out of osier beds by operations of defendants was trespass or nuisance; as damage was caused there was no necessity to distinguish the torts); *Miller v Jackson* [1977] QB 966, [1977] 3 All ER 338, CA (cricket balls landing in plaintiff's garden held to be a nuisance; claimant not pleading trespass).

2 See *Rylands v Fletcher* (1868) LR 3 HL 330; *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL (element of foreseeability required); *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1, [2004] 1 All ER 589; and **NUISANCE** vol 78 (2010) PARA 148 et seq.

3 See **NUISANCE** vol 78 (2010) PARA 118.

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#### 564. Distress and execution.

It is trespass for a person to levy an illegal distress<sup>1</sup> or, having rightfully entered on land for the purposes of distress, to remain there when the distress has become wrongful<sup>2</sup>. In the same way, it is trespass for a sheriff to levy wrongful execution<sup>3</sup> or, having rightfully entered on land for the purposes of execution, to remain there when the execution has become wrongful<sup>4</sup>.

1 See *Polley v Fordham* [1904] 2 KB 345 at 348 per Wills J; and **DISTRESS** vol 13 (2007 Reissue) PARA 959. As to unlawful eviction by a landlord see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 653 et seq.

2 *Etherton v Popplewell* (1801) 1 East 138; *Ladd v Thomas* (1840) 12 Ad & El 117. See also PARA 567 note 2; and **DISTRESS** vol 13 (2007 Reissue) PARA 1076 et seq.



3 See *Watson v Murray & Co* [1955] 2 QB 1, [1955] 1 All ER 350; *McLeod v Butterwick* [1998] 2 All ER 901, [1998] 1 WLR 1603. For protection see CPR Sch 1 RSC Ord 17 rr 2, 3. As to execution generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1265 et seq.

4 See *Playfair v Musgrove* (1845) 14 M & W 239; *Ash v Dawnay* (1852) 8 Exch 237; PARA 567 note 2; and **CIVIL PROCEDURE**.

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### 565. Tenant trespasser.

If a tenancy determines by effluxion of time or otherwise, and the former tenant remains in possession against the will of the rightful owner, the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy<sup>1</sup>. A tenant holding over is not a trespasser until demand is made, since trespass can only be committed against the present possessor of the land<sup>2</sup>.

1 *Coffee v McEvoy* [1912] 2 IR 290, Ir CA. As to a tenant at sufferance see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 206-207. A tenant pur autre vie holding over after the death of the cestui que vie, without consent of the person next entitled, is a trespasser: see the Cestui que Vie Act 1707 s 5; and **REAL PROPERTY** vol 39(2) (Reissue) PARA 156.

2 *Hey v Moorhouse* (1839) 6 Bing NC 52. As to persons refusing to leave a ship on the termination of a licence see *Canadian Pacific Rly v Gaud* [1949] 2 KB 239, CA.

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### 566. Abuse of right.

If land is subject to a public or private right of way or any similar right, a person who unlawfully uses the land for any purpose other than that of exercising the right to which it is subject is a trespasser, and can be sued by the person in possession of the land<sup>1</sup>.

1 *Lade v Shepherd* (1735) 2 Stra 1004; *Northampton Corpn v Ward* (1745) 1 Wils 107; *Dovaston v Payne* (1795) 2 H Bl 257; *Cox v Glue*, *Cox v Saint*, *Cox v Mousley* (1848) 5 CB 533; *Rigg v Earl of Lonsdale* (1857) 1 H & N 923, Ex Ch; *Harrison v Duke of Rutland* [1893] 1 QB 142, CA; *Hickman v Maisey* [1900] 1 QB 752, CA (distinguished in *Randall v Tarrant* [1955] 1 All ER 600, [1955] 1 WLR 255, CA); *Staffordshire and Worcestershire Canal Navigation v Bradley* [1912] 1 Ch 91; *Iveagh v Martin* [1961] 1 QB 232 at 273, [1960] 2 All ER 668 at 683-684 per Paull J; *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL (a peaceful non-obstructive demonstration on a road is not a trespassory assembly within the Public Order Act 1986 ss 14A, 14B(2) (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 582)).

In *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL, the House of Lords ruled that the public's right of access to a public highway is not restricted to the right of passage and matters incidental or ancillary to that right, and may extend to a peaceful and non-obstructive assembly on it. Earlier cases on demonstrations and other public assemblies must now be read in that light: see eg *Ex p Lewis* (1888) 21 QBD 191; *Hubbard v Pitt* [1976] QB 142, [1975] 3 All ER 1, CA. See also **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 197. The foreshore is not a public highway and the public have no general right to use it: see *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139; *Iveagh v Martin* [1961] 1 QB 232 at 273, [1960] 2 All ER 668 at 683-684 per Paull J; cf *Llandudno UDC v Woods* [1899] 2 Ch 705 (injunction not granted because harm trivial); and see also

**AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 802. As to excessive user of a right of way see **EASEMENTS AND PROFITS A PRENDRE**.

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### **567. Trespass ab initio.**

If a person enters on the land of another under an authority given him by law, and, while there, abuses the authority by an act which amounts to a trespass, he becomes a trespasser ab initio, and may be sued as if his original entry were unlawful<sup>1</sup>. Instances of an entry under the authority of the law are the entry of a customer into a common inn, of a reversioner to see if waste has been done, or of a commoner to see his cattle<sup>2</sup>.

To make a person a trespasser ab initio there must be a wrongful act committed; a mere nonfeasance is not enough<sup>3</sup>.

1 *Six Carpenters' Case* (1610) 8 Co Rep 146a. A lawful entry followed by lawful seizure of some goods and unlawful seizure of others will not make the person so entering a trespasser ab initio in respect of those lawfully seized or in respect of the premises: *Canadian Pacific Wine Co v Tuley* [1921] 2 AC 417, PC; *Elias v Pasmore* [1934] 2 KB 164; *Owen and Smith (t/a Nuagin Car Service) v Reo Motors (Britain) Ltd* (1934) 151 LT 274, CA, per Maughan LJ. See also *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299, [1968] 1 All ER 229, CA, in which the rule was criticised; but contra *Cinnamond v British Airports Authority* [1980] 2 All ER 368 at 373, [1980] 1 WLR 582 at 588, CA, per Lord Denning MR.

2 *Six Carpenters' Case* (1610) 8 Co Rep 146a. Where distress is made for rent justly due and any irregularity is afterwards done by the distrainor, the distress is not to be deemed unlawful, nor the distrainor a trespasser ab initio, but the party aggrieved may recover damages for the special damage sustained: see the Distress for Rent Act 1737 s 19 (repealed by the Tribunals, Courts and Enforcement Act 2007 ss 86, 146, Sch 14 para 4(c), Sch 23 Pt 4, as from a day to be appointed). At the date at which this volume states the law, no such day had been appointed. See also **DISTRESS** vol 13 (2007 Reissue) PARA 1078. A sheriff who enters land under legal process becomes a trespasser by remaining there for more than a reasonable time (see PARA 564), but is not, it seems, a trespasser ab initio (*Lee v Dangar, Grant & Co* [1892] 1 QB 231 at 242 per Denman J; affd [1892] 2 QB 337, CA). See also **SHERIFFS** vol 42 (Reissue) PARAS 1133-1134.

3 *Six Carpenters' Case* (1610) 8 Co Rep 146a; *Shorland v Govett* (1826) 5 B & C 485, where it was also said, obiter, that if a person were a trespasser ab initio that would affect the assessment of damages; *West v Nibbs* (1847) 4 CB 172; cf *Winterbourne v Morgan* (1809) 11 East 395.

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### **568. Continuity of trespass and the effects of trespass.**

It may be necessary to distinguish between continuing trespass and the continuing effects of a trespass. Continuing trespass occurs when a person who is or has become a trespasser remains on the land as a trespasser<sup>1</sup> or when objects placed on or intruding into land by way of trespass remain unremoved<sup>2</sup>. In these circumstances, a new trespass is committed from day to day, successive actions may be brought<sup>3</sup> and the trespasser can be required to remove any trespassing material<sup>4</sup>. The occupier may be entitled to damages even for damage resulting from trespassory intrusion before he went into occupation<sup>5</sup>.

Where there are continuing effects of trespass there is one act of intrusion or contact causing persisting damage but no continuing trespassory contact or intrusion. Damages must be assessed in a single action and the trespasser cannot be required to make good the harm<sup>6</sup>.

The distinction between a continuing tort and the continuing effects of the tort may affect limitation<sup>7</sup>.

1 *Winterbourne v Morgan* (1809) 11 East 395 at 405 per Bayley J.

2 *Holmes v Wilson* (1839) 10 Ad & El 503 (trespassing road buttresses not removed after being adjudged trespass); *Hudson v Nicholson* (1839) 5 M & W 437; *Bowyer v Cook* (1847) 4 CB 236 (tree stumps and cuttings); *Clarke v Midland Great Western Rly* [1895] 2 IR 294, Ir CA; *Konskier v B Goodman Ltd* [1928] 1 KB 421, CA (builders' rubbish). Damages are assessed to judgment unless they are awarded in lieu of an injunction, when they may take account of future harm: *Leeds Industrial Co-operative Society v Slack* [1924] AC 851, HL.

3 *Holmes v Wilson* (1839) 10 Ad & El 503.

4 *Holmes v Wilson* (1839) 10 Ad & El 503.

5 By analogy with private nuisance: see *Masters v Brent London Borough Council* [1978] QB 841, [1978] 2 All ER 664; *Delaware Mansions Ltd v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, [2001] 4 All ER 737.

6 *Clegg v Dearden* (1848) 12 QB 576.

7 Analogy with other torts suggests that, in the case of continuing effects, time runs from the commission of the tort (see *Violett v Sympson* (1857) 8 E & B 344 (maliciously opposing release from imprisonment)), but in the case of a continuing trespass time runs from day to day as long as the trespass continues (see *Massey v Johnson* (1809) 12 East 67; *Bailey v Warden* (1815) 4 M & S 400; *Hardy v Ryle* (1829) 9 B & C 603 (false imprisonment); *Earl of Harrington v Derby Corp'n* [1905] 1 Ch 205 (nuisance)). See generally **LIMITATION PERIODS** vol 68 (2008) PARA 977 et seq.

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### 569. Subject matter of trespass.

The subject matter of trespass to land must be real and corporeal property, that is, land or buildings, or the vesture of land or herbage or pasture, to the exclusive possession of which the person complaining of the trespass is entitled<sup>1</sup>. A mere incorporeal right, such as a right of common or pasture, fishing or digging turf, or a right of way, or a right to a pew or any easement annexed to land, does not confer standing to sue for trespass to the land if such a right does not give exclusive possession<sup>2</sup>.

1 Co Litt 4b; 2 Roll Abr 549, Trespass (H); *Burt v Moore* (1793) 5 Term Rep 329; *Crosby v Wadsworth* (1805) 6 East 602; *Stammers v Dixon* (1806) 7 East 200; *Stanley v White* (1811) 14 East 332; *Tompkinson v Russell* (1821) 9 Price 287; *Harper v Charlesworth* (1825) 4 B & C 574; *Cox v Glue*, *Cox v Saint*, *Cox v Mousley* (1848) 5 CB 533; *Wellaway v Courtier* [1918] 1 KB 200, DC; *Back v Daniels* [1925] 1 KB 526 at 542, CA, per Scrutton LJ; *Monsanto v Tilly* [1999] NLJR 1833, [1999] All ER (D) 1321, [2000] Env LR 313, CA. Trespass lies for an interference with an exclusive right of cutting turf (*Wilson v Mackreth* (1766) 3 Burr 1824; *Coverdale v Charlton* (1878) 4 QBD 104, CA), or underwood (*Hoe v Taylor* (1595) 4 Cro Eliz 413), or timber (*Glenwood Lumber Co Ltd v Phillips* [1904] AC 405, PC), or for interference with a several fishery (*Holford v Bailey* (1846) 8 QB 1000 (revsd (1849) 13 QB 426, Ex Ch); *Marshall v Ulleswater Steam Navigation Co Ltd* (1863) 3 B & S 732 (affd (1865) 6 B & S 570, Ex Ch); *Crichton v Coltery* (1870) 19 WR 107; *Fitzgerald v Firbank* [1897] 2 Ch 96, CA; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84: see **AGRICULTURE AND FISHERIES** vol 1(2) (2007 Reissue) PARA 842), or a free warren (*Lord Dacre v Tebb* (1777) 2 Wm Bl 1151; see **COMMONS** vol 13 (2009) PARAS 454, 464). See generally **EASEMENTS AND PROFITS A PRENDRE**. Where trees are excepted from a lease, the lessor may enter and cut them (*Ashmead v Ranger* (1700) 1 Ld Raym 551; revsd (1702) Lords Journals, 27 April), and if the tenant cuts them

the lessor may bring a claim of trespass (*Rolls v Rock* (1729) 2 Selwyn's Law of Nisi Prius (13th Edn) 1244). See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 191. A person in possession of the surface is prima facie in possession of the subsoil (*Keyse v Powell* (1853) 2 E & B 132), but possession of the surface may be in one person and possession of the subsoil in another (*Cox v Glue*, *Cox v Saint*, *Cox v Mousley* (1848) 5 CB 533). The owner of a close upon which others have a right to depasture cattle, with exclusive possession during the period of depasture, may maintain trespass against a party who digs holes in the close, but not against one who rides over it: *Cox v Glue*, *Cox v Saint*, *Cox v Mousley* (1848) 5 CB 533. See also note 2.

2 *Wilson v Mackreth* (1766) 3 Burr 1824; *Stocks v Booth* (1786) 1 Term Rep 428 at 430; *Mainwaring v Giles* (1822) 5 B & Ald 356; *Bryan v Whistler* (1828) 8 B & C 288. A claim may be brought for the disturbance of such a right: see *Fitzpatrick v Verschoye* [1912] 1 IR 8; *King v Brown*, *Durant & Co* [1913] 2 Ch 416; and **EASEMENTS AND PROFITS A PRENDRE**. A claim of trespass lies by a person who has by prescription acquired the ownership of a private chapel: see *Chapman v Jones* (1869) LR 4 Exch 273; *Duke of Norfolk v Arbuthnot* (1880) 5 CPD 390, CA. The erector of a tombstone may maintain trespass against a person who wrongfully removes it from the churchyard: *Spooner v Brewster* (1825) 3 Bing 136. See also **TORT** vol 45(2) (Reissue) PARA 668; and **ECCLESIASTICAL LAW**.

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### 570. Land out of the jurisdiction.

Any court in England and Wales or Northern Ireland has jurisdiction to entertain proceedings for trespass to land situated outside that part of the United Kingdom unless the proceedings are principally concerned with a question of title or the right to possession<sup>1</sup>.

1 See PARA 490; and **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 392 et seq.

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### 571. Trespass by aircraft.

The mere entry by an aircraft into the airspace above a person's land is not a trespass<sup>1</sup>. No claim may be brought in respect of trespass by aircraft by reason only of the flight of the aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable, or by reason of the ordinary incidents of such flight, provided the statutory conditions are complied with<sup>2</sup>.

1 *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479, [1977] 2 All ER 902 (aircraft pilot flying over a house to photograph it without the owner's permission).

2 See the Civil Aviation Act 1982 s 76(1); and **AIR LAW** vol 2 (2008) PARA 652 et seq. The Act does not merely protect the right of passage over land but applies to all flights: see *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479 at 488-489, [1977] 2 All ER 902 at 908-909 per Griffiths J, considering the same provision in earlier legislation. However, where any material loss or damage is caused to any person or property on land or water by, or by a person in or an article or person falling from an aircraft while in flight, taking off or landing then, unless the loss or damage was contributed to by the negligence of the victim, damages in respect of the loss or damage are recoverable without proof of negligence or intention or other cause of action, as if the harm had been caused by the wilful, act, neglect or default of the owner of the aircraft: Civil Aviation Act 1982 s 76(2). 'Loss or damage' includes, in relation to persons, loss of life and personal injury: s 105. As to taking off see *Blankley v Godley* [1952] 1 All ER 436n.

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### **572. Intention or negligence of the defendant.**

If the defendant intends to enter the land on to which he trespassed it is no defence that he mistakenly thought that it was his own land or that he had authority to be there<sup>1</sup>; nor is it a defence that he inadvertently crossed the boundary between the claimant's land and his own<sup>2</sup>. But there is no liability if his act is involuntary<sup>3</sup>.

Liability in trespass may arise where the defendant intentionally or negligently causes or allows things under his control to enter the claimant's land<sup>4</sup>, but not if the entry occurred without his fault<sup>5</sup>.

1 *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266 at 274, [1951] 1 All ER 363 at 366-367, CA, per Asquith LJ.

2 *Basely v Clarkson* (1681) 3 Lev 37.

3 *Smith v Stone* (1647) Sty 65 (defendant not liable where he was carried and thrown onto the plaintiff's land); *National Coal Board v JE Evans & Co (Cardiff) Ltd and Maberley Parker Ltd* [1951] 2 KB 861, [1951] 2 All ER 310, CA. Duress is not a defence: *Gilbert v Stone* (1647) Aleyn 35.

4 *Read v Edwards* (1864) 17 CB NS 245; *League Against Cruel Sports Ltd v Scott* [1986] QB 240, [1985] 2 All ER 489.

5 *Brown v Giles* (1823) 1 C & P 118. See also PARA 563 note 1.

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## **B. POSSESSION SUFFICIENT TO SUPPORT TRESPASS**

### **573. What possession is sufficient.**

Any form of possession, so long as it is exclusive and exercised with the intention to possess<sup>1</sup>, is sufficient to support a claim of trespass against a wrongdoer<sup>2</sup>. It is not necessary, in order to maintain trespass, that the claimant's possession should be lawful<sup>3</sup>, and actual possession is good against all except those who can show a better right to possession in themselves<sup>4</sup>. However, a mere trespasser who goes into occupation cannot by the very act of trespass and without acquiescence give himself possession against the person whom he has ejected<sup>5</sup>. Such a person may eject the trespasser by force, if no more force is used than is reasonably necessary<sup>6</sup>. The trespasser cannot set up a jus tertii unless he claims under it<sup>7</sup>.

1 See PARA 574.

2 It has been held that the slightest amount of possession is sufficient to entitle the person in possession, or the person who claims under those who have been or are in possession, to recover against a mere trespasser: see *Bristow v Cormican* (1878) 3 App Cas 641 at 657, HL, per Lord Hatherley. See also *Wuta-Ofei v Danquah* [1961] 3 All ER 596 at 600, [1961] 1 WLR 1238 at 1243, PC. However, mere possession is not sufficient to

support an action of trespass against the lawful owner of the land: see *Delaney v TP Smith Ltd* [1946] KB 393, [1946] 2 All ER 23, CA.

In *Bristow v Cormican* (1878) 3 App Cas 641, HL, at 651-652, Lord Cairns LC maintained the proposition, which was not dissented from, that even in the absence of actual possession a documentary title commencing with some person rightfully in possession, or who has an admitted or proved right to be in possession, and connecting itself with the claimant in a claim of trespass would, generally speaking, and in the absence of any title in the defendant by adverse possession, be sufficient to maintain a claim of trespass. However, title need not be shown where the claimant has actual possession: see *Foster v Warblington UDC* [1906] 1 KB 648, CA. Cf *Scorell v Boxall* (1827) 1 Y & J 396.

A licensee with a contractual right to occupy can claim possession against a trespasser if that remedy is necessary to give effect to his right (*Manchester Airport plc v Dutton* [2000] QB 133, sub nom *Dutton v Manchester Airport plc* [1999] 2 All ER 675, CA) but a licensee without rights of occupation cannot so claim (*Countryside Residential (North Thames) Ltd v T* (2000) 81 P & CR 10, CA). See also *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 257, [1970] 3 All ER 326 at 346 per Megarry J.

3 *Graham v Peat* (1801) 1 East 244; *Chambers v Donaldson* (1809) 11 East 65; *Asher v Whitlock* (1865) LR 1 QB 1 (approved in *Perry v Clissold* [1907] AC 73, PC).

4 *Doe d Hughes v Dyeball* (1829) Mood & M 346; *Asher v Whitlock* (1865) LR 1 QB 1; *Perry v Clissold* [1907] AC 73 at 79, PC. Cf *Delaney v TP Smith Ltd* [1946] KB 393, [1946] 2 All ER 23, CA (claim against lawful owner). The defendant to an action for trespass to land cannot set up a *jus tertii* unless he claims under or with the authority of the true owner, or of a person having a better right to possession than the claimant: see PARA 579. As to *jus tertii* where the claimant is out of possession and seeks to recover the land see *Ezekiel v Fraser* [2002] EWHC 2066 (Ch), [2002] NPC 132, not following *Doe d Carter v Barnard* (1849) 13 QB 945.

5 *Browne v Dawson* (1840) 12 Ad & El 624; *Stanford v Hurlstone* (1873) 9 Ch App 116.

6 *Scott v Matthew Brown & Co Ltd* (1884) 51 LT 746.

7 See PARA 579.

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## 574. Actual possession.

Actual possession is a question of fact<sup>1</sup>. It consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons<sup>2</sup>. The extent of the control which should be exercised in order to constitute possession varies with the nature of the land; and possession means possession of that character of which the land is capable<sup>3</sup>. Thus a person may be in possession of minerals even though he is not in possession of the surface and has no actual occupation of the minerals<sup>4</sup>.

1 *Bristow v Cormican* (1878) 3 App Cas 641, HL. As to acts of ownership which are evidence of possession see *Malcomson v O'Dea* (1863) 10 HL Cas 593; and **CIVIL PROCEDURE** vol 11 (2009) PARA 875. See also *Seddon v Smith* (1877) 36 LT 168, CA (ploughing land). Acts of ownership of one part of the land may be evidence of possession of the whole or of other parts: see *Stanley v White* (1811) 14 East 332; *Jones v Williams* (1837) 2 M & W 326; *Taylor v Parry* (1840) 1 Man & G 604; *Wild v Holt* (1842) 9 M & W 672; *Lord Advocate v Lord Blantyre* (1879) 4 App Cas 770 at 791, HL, per Lord Blackburn; *Bristow v Cormican* (1878) 3 App Cas 641, HL; *Coverdale v Charlton* (1878) 4 QBD 104 at 118, CA, per Bramwell LJ; *Clark v Elphinstone* (1880) 6 App Cas 164, PC. As to possession of land see also **LIMITATION PERIODS** vol 68 (2008) PARA 1078 et seq; **REAL PROPERTY** vol 39(2) (Reissue) PARA 167; **SALE OF LAND** vol 42 (Reissue) PARA 124; **SETTLEMENTS** vol 42 (Reissue) PARA 761. As to transfer of possession sufficient to constitute a surrender of a lease see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 634. As to what amounts to possession by a mortgagee see **MORTGAGE** vol 77 (2010) PARA 410 et seq. As to the date of transfer of possession on a sale of land see **SALE OF LAND** vol 42 (Reissue) PARA 186. As to the right of a tenant for life of settled land to possession see **SETTLEMENTS** vol 42 (Reissue) PARA 770. As to licensees see *Manchester Airport plc v Dutton* [2000] QB 133, sub nom *Dutton v Manchester Airport plc* [1999] 2 All ER 675, CA (a licensee with a contractual right to occupy can claim possession against a trespasser if that

remedy is necessary to give effect to his right); *Countryside Residential (North Thames) Ltd v T* (2000) 81 P & CR 10, CA (a licensee without rights of occupation cannot so claim). See also *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 257, [1970] 3 All ER 326 at 346 per Megarry J.

2 *Powell v McFarlane* (1977) 38 P & CR 452 at 470 per Slade J; *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [40], [2003] 1 AC 419 at [40], [2002] 3 All ER 865 at [40] per Lord Browne-Wilkinson.

3 *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273 at 288, HL, per Lord O'Hagan; *Lord Advocate v Young, North British Ry Co v Young* (1887) 12 App Cas 544 at 556, HL, per Lord Fitzgerald; *Kirby v Cowderoy* [1912] AC 599, PC; *Kynoch Ltd v Rowlands* [1912] 1 Ch 527, CA; *Hegan v Carolan* [1916] 2 IR 27; *Wuta-Ofei v Danquah* [1961] 3 All ER 596 at 600, [1961] 1 WLR 1238 at 1243, PC. Possession of an unoccupied building may be shown by holding the key or controlling entry: *Jewish Maternity Society's Trustees v Garfinkle* (1926) 95 LJB 766. See also *Catteris v Cowper* (1812) 4 Taunt 547; *Harper v Charlesworth* (1852) 4 B & C 574; *Jones v Williams* (1837) 2 M & W 326; *Matson v Cook* (1838) 4 Bing NC 392; *Every v Smith* (1857) 26 LJ Ex 344; *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979, CA; *Ocean Estates v Pinder* [1969] 2 AC 19, [1969] 2 WLR 1359, PC. The possession must be exclusive: see *Powell v McFarlane* (1977) 38 P & CR 452 at 470-471 per Slade J; *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419, [2002] 3 All ER 865 at [41] per Lord Browne-Wilkinson. Even surrounding land with a fence is not sufficient if it does not achieve exclusive possession: *Marsden v Miller* (1992) 64 P & CR 239, CA. In *Coverdale v Charlton* (1878) 4 QBD 104, CA, it was held that pasturing cattle on roadside verges did not establish such possession. However, possession might have been established if the only other road users were trespassers: *Reilly v Thompson & Fagan* (1877) 11 Ir CL 238. See further the cases cited in note 4.

4 *Rich d Lord Cullen v Johnson* (1740) 2 Stra 1142; *Hodgkinson v Fletcher* (1781) 3 Doug KB 31; *Adair v Shaftoe* (circa 1790) cited in 19 Ves at 156; *Seaman v Vawdrey* (1810) 16 Ves 390; *M'Donnell v M'Kinty* (1847) 10 ILR 514; *Keyse v Powell* (1853) 2 E & B 132; *Smith v Lloyd* (1854) 9 Exch 562; *Earl of Dartmouth v Spittle* (1871) 24 LT 67; *Low Moor Co v Stanley Coal Co Ltd* (1876) 34 LT 186, CA; *Ashton v Stock* (1877) 6 ChD 719; *Elwes v Brigg Gas Co* (1886) 33 ChD 562, Ex Ch; *Thompson v Hickman* [1907] 1 Ch 550; *Glyn v Howell* [1909] 1 Ch 666. See also **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 20 et seq (property in mines), PARA 31 (recovery of possession), PARA 38 (damages for trespass), PARA 43 et seq (damages recoverable), PARA 264 (trespass by a mine owner carrying minerals through land of another) PARA 273 (trespass by flooding), and PARA 596 (trespass in the Derbyshire High Peak mining district).

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### **C. WHO MAY SUE FOR TRESPASS TO LAND**

#### **575. Person in possession.**

Trespass is an injury to a possessory right, and therefore the proper claimant in a claim of trespass to land is the person who was<sup>1</sup>, or who is deemed to have been<sup>2</sup>, in possession at the time of the trespass<sup>3</sup>. The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since a mere right of property without possession is not sufficient to support the claim<sup>4</sup>. However, if land is vacant, the owner has sufficient possession to sue in trespass<sup>5</sup>. The type of conduct necessary to evidence possession varies with the type of land, and to maintain a claim against a person who never had any title to the land the slightest amount of possession is sufficient<sup>6</sup>. Where possession is doubtful or equivocal, the law attaches it to the title<sup>7</sup>.

1 A non-occupying tenant has not such possession as will entitle him to maintain trespass: see *Thompson v Ward* [1953] 2 QB 153 at 163-164, [1953] 1 All ER 1169 at 1173-1174, CA, per Evershed MR. Cf *Brown v Draper* [1944] KB 309, [1944] 1 All ER 246, CA; and see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 833 (statutory tenant losing rights by abandoning possession).

2 As to trespass by relation see PARA 576.

3 *Smith v Milles* (1786) 1 Term Rep 475; *Barton v Cordy* (1825) M'Cle & Yo 278; *Topham v Dent* (1830) 6 Bing 515; *Alexander v Bonnin* (1838) 6 Scott 611; *Brown v Notley* (1848) 3 Exch 219; *Ryan v Clark* (1849) 14 QB 65; *Turner v Cameron's Coalbrook Steam Coal Co* (1850) 5 Exch 932; *Litchfield v Ready* (1850) 5 Exch 939; *Harrison v Blackburn* (1864) 17 CBNS 678; *Stocker v Planet Building Society* (1879) 27 WR 877, CA; *Cooper v Crabtree* (1882) 20 ChD 589, CA; *Moore v Shelley* (1883) 8 App Cas 285, PC; *New Trinidad Lake Asphalt Co v A-G* [1904] AC 415 at 421, PC; *Marsden v Miller* (1992) 64 P & CR 239, CA. A tenant at sufferance can maintain a claim of trespass: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 207. As to the effect of the person in possession becoming bankrupt after a trespass see *Rose v Buckett* [1901] 2 KB 449, CA (no substantial damage done; action did not pass to trustee); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 435-436.

4 *Wallis v Hands* [1893] 2 Ch 75. A lessor at will might bring trespass against a stranger, without first re-entering: see *Anon* (1440) YB 19 Hen 6, fo 44, pl 94; *Geary v Bearecroft* (1667) 1 Lev 202; *Harper v Charlesworth* (1825) 4 B & C 574 at 583; Bro Abr, Trespass, pl 131; 2 Roll Abr 551, Trespass (H); Com Dig, Trespass (B2). If a tenant at will commits voluntary waste, his tenancy is by that act determined and trespass can be brought against him: *Countess of Shrewsbury's Case* (1600) 5 Co Rep 13b; Co Litt 57a (note (1)), 62b; but see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 434.

5 *R v St Pancras Assessment Committee* (1877) 2 QBD 581 at 588 per Lush J. However, a bare possessor who leaves without intending to return loses possession entirely: *Trustees, Executors and Agency Co Ltd v Short* (1888) 13 App Cas 793, PC.

6 *Wuta-Ofei v Danquah* [1961] 3 All ER 596 at 600, [1961] 1 WLR 1238 at 1243, PC. It is not necessary, in order to establish possession, for a claimant to take some active steps in relation to the land, such as inclosing it or cultivating it: *Wuta-Ofei v Danquah* [1961] 3 All ER 596 at 600, [1961] 1 WLR 1238 at 1243, PC. See also *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979, CA (foreshore).

7 *Canvey Island Comrs v Preedy* [1922] 1 Ch 179; *Jones v Chapman* (1849) 2 Exch 803 at 821 per Maule J; *Lows v Telford* (1876) 1 App Cas 414 at 426, HL. See also *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 QB 618, [1968] 1 All ER 979, CA.

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### 576. Person with right to possession.

A person having the right to the possession of land acquires by entry<sup>1</sup> the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of entry, wrongfully continues on the land<sup>2</sup>.

If an owner who has a right to enter makes an entry on land, his right of possession relates back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation<sup>3</sup>.

The occupation of land by an employee or agent in that capacity vests the possession in the employer or principal; the employee or agent cannot sue in trespass, but the employer or principal can<sup>4</sup>. An occupier of lodgings can sue in trespass if he has exclusive possession<sup>5</sup>. A mere licensee cannot generally maintain trespass<sup>6</sup>, but a licensee with a contractual right to occupy the land can claim possession against a trespasser if that is necessary to give effect to his contractual right<sup>7</sup>.

1 The entry is effective even if made forcibly: see *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720, CA. However, see the Protection from Eviction Act 1977; PARA 587; and **LANDLORD AND TENANT**. No claim for trespass to land lies at the suit of a tenant against a landlord for a forcible entry after the expiration of the term: *Taunton v Costar* (1797) 7 Term Rep 431; *Argent v Durrant* (1799) 8 Term Rep 403; *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720, CA. However, where (subject to exceptions) any premises are let as a dwelling under a tenancy which has come to an end, but the occupier continues to reside in the premises or part of them, it is not lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises: see the Protection from Eviction Act 1977 s 3 (amended



by the Housing Act 1980 s 69(1); and the Housing Act 1988 s 30). A landlord may be liable in damages for (amongst other things) unlawfully evicting the residential occupier of premises: see the Housing Act 1988 ss 27, 28; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 654-655. There are further restrictions on the recovery of possession of premises to which the Rent Acts apply (see **LANDLORD AND TENANT**), and the contractual term of certain business premises is extended by statute (see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 701). Where a right to possession ceases, possession is deemed to cease unless some act indicating an intention to retain possession is done: *Brown v Notley* (1848) 3 Exch 219 at 222 per Parke B; *Wuta-Ofei v Danquah* [1961] 3 All ER 596 at 599-600, [1961] 1 WLR 1238 at 1242-1243, PC. The slightest acts by the person having title to the land, or by his predecessors in title, indicating his intention to take possession may be sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title: see *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 at 25, [1969] 2 WLR 1359 at 1364, PC.

2 *Taunton v Costar* (1797) 7 Term Rep 431; *Butcher v Butcher* (1827) 7 B & C 399; *Hey v Moorhouse* (1839) 6 Bing NC 52; *Jones v Chapman* (1849) 2 Exch 803 at 821, Ex Ch, per Maule J; *Lows v Telford* (1876) 1 App Cas 414, HL; *Hegan v Carolan* [1916] 2 IR 27.

3 *Barnett v Earl of Guildford* (1855) 11 Exch 19; *Anderson v Radcliffe* (1858) EB & E 806 (affd sub nom *Radcliffe v Anderson* (1860) EB & E 819); *Ocean Accident and Guarantee Corp v Ilford Gas Co* [1905] 2 KB 493, CA.

4 *Bertie v Beaumont* (1812) 16 East 33; *Moore (Lessee) v Doherty* (1843) 5 ILR 449; *Mayhew v Suttle* (1854) 4 E & B 347, Ex Ch.

5 *Monks v Dykes* (1839) 4 M & W 567; *Lane v Dixon* (1847) 3 CB 776. See also *Lewis v Ponsford* (1838) 8 C & P 687 at 690 per Lord Denman CJ (a child or employee may have such possession of his bedroom as to permit him to sue). Cf *R v St George's Union* (1871) LR 7 QB 90 at 97 per Cockburn J; *Allan v Liverpool Overseers, Inman v West Derby Union Assessment Committee and Kirkdale Overseers* (1874) LR 9 QB 180 at 191-192, DC, per Blackburn J. The grant of residential accommodation for a fixed or periodic term at a stated rent prima facie creates a tenancy, even if the stated intention of the parties is to the contrary: see *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL. A tenant who holds over after the termination of an ordinary tenancy and becomes a tolerated trespasser, the landlord agreeing not to evict, has sufficient interest to maintain an action in trespass: see *Pemberton v Southwark London Borough Council* [2000] 3 All ER 924, [2000] 1 WLR 1672, CA.

6 *Allan v Liverpool Overseers, Inman v West Derby Union Assessment Committee and Kirkdale Overseers* (1874) LR 9 QB 180. See also *Hill v Tupper* (1863) 2 H & C 121.

7 See *Manchester Airport plc v Dutton* [2000] QB 133, sub nom *Dutton v Manchester Airport plc* [1999] 2 All ER 675, CA. A licensee without rights of occupation cannot so claim: *Countryside Residential (North Thames) Ltd v T* (2000) 81 P & CR 10, CA. See also *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 267, [1970] 3 All ER 326 at 346 per Megarry J. As to lodgers see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 16.

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### 577. Tenant and reversioner.

If land is in the possession of a tenant, the tenant<sup>1</sup> is the proper claimant to sue for trespass committed in respect of the land; but where the trespass is not merely of a temporary nature, but is injurious to the reversion, the reversioner, although he cannot sue in trespass<sup>2</sup>, may sue for the injury done to his interest<sup>3</sup>.

1 This includes a tenant at sufferance: see *Graham v Peat* (1801) 1 East 244; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 207.

2 The claim by the reversioner is not a claim of trespass. In a claim of trespass to land the claimant alleges that the defendant wrongfully entered the claimant's land; whereas, in a claim by a reversioner, the claimant generally alleges that the defendant injured the claimant's reversion in land: see *Jackson v Pesked* (1813) 1 M & S 234; *Hosking v Phillips* (1848) 3 Exch 168; *Kidgill v Moor* (1850) 9 CB 364; *Metropolitan Association v Petch* (1858) 5 CBNS 504.

3 A reversioner may sue for such injuries as structural injury to a house (*Shelfer v City of London Electric Lighting Co*, *Meux's Brewery Co v City of London Electric Lighting Co* [1895] 1 Ch 287, CA), cutting down trees (*Cotterill v Hobby* (1825) 4 B & C 465), digging holes and spoiling the surface of land for the purpose of quarrying or mining (*Rogers v Taylor* (1857) 1 H & N 706), placing the foundation of a wall in the claimant's land (*Mayfair Property Co v Johnston* [1894] 1 Ch 508), building a house with eaves which discharged water on the claimant's land (*Tucker v Newman* (1839) 11 Ad & El 40; *Battishill v Reed* (1856) 18 CB 696), pulling down the eaves of the claimant's house and preventing the rainwater from flowing onto adjoining land (*Battishill v Reed* (1856) 18 CB 696), removing a dam placed for the purpose of diverting a stream so as to irrigate the claimant's land (*Greenslade v Halliday* (1830) 6 Bing 379), and polluting a river by pouring sewage into it (*Jones v Llanrwst UDC* [1911] 1 Ch 393 at 404 per Parker J). The reversioner has no claim if the damage is not such as will last beyond the end of the term, even if the current commercial value of the reversion is diminished: see *Rust v Victoria Graving Dock Co and London and St Katharine Dock Co* (1887) 36 ChD 113, CA (flooding of property development). The reversioner may sue the tenant for waste injurious to the reversion: see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 434-435. See also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 658 (notice to landlord of adverse claims), 660 et seq (recovery of possession by a landlord).

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### 578. Co-owners.

A joint tenant or a person entitled in common under a trust of land<sup>1</sup> can maintain trespass against his co-tenant if the co-tenant expels him from the land or destroys the subject of the co-tenancy without his consent, but not otherwise<sup>2</sup>.

1 As to joint tenancies see **REAL PROPERTY** vol 39(2) (Reissue) PARA 190 et seq. As to tenancies in common see **REAL PROPERTY** vol 39(2) (Reissue) PARA 207 et seq. As to trusts of land see **REAL PROPERTY** vol 39(2) (Reissue) PARA 66.

2 *Murray v Hall* (1849) 7 CB 441. See also *Wilkinson v Haygarth* (1847) 12 QB 837 (on appeal (1848) 12 QB 851, Ex Ch); *Cresswell v Hedges* (1862) 1 H & C 421; *Stedman v Smith* (1857) 8 E & B 1; *Watson v Gray* (1880) 14 ChD 192. Cf *Martyn v Knowllys* (1799) 8 Term Rep 145; *Cubitt v Porter* (1828) 8 B & C 257; *Jacobs v Seward* (1872) LR 5 HL 464; *Job v Potton* (1875) LR 20 Eq 84. As to the right to an account between joint tenants see **REAL PROPERTY** vol 39(2) (Reissue) PARA 196. A co-tenant of a party wall may not claim trespass against his co-tenant for pulling down the wall for the purpose of rebuilding it (*Standard Bank of British South America v Stokes* (1878) 9 ChD 68; *Cubitt v Porter* (1828) 8 B & C 257) unless the defendant trespasses on the adjoining property of the claimant (*Mayfair Property Co v Johnston* [1894] 1 Ch 508) or his acts amount to an ouster from possession of the wall (*Stedman v Smith* (1857) 8 E & B 1). See **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 972. As to party walls generally see **BOUNDARIES** vol 4(1) (2002 Reissue) PARA 964 et seq. As to what constitutes possession by co-owners for the purposes of the limitation of actions see **LIMITATION PERIODS** vol 68 (2008) PARA 1094.

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## D. DEFENCES

### 579. Claim of right.

A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right<sup>1</sup>; but he may not set up the title of a third person unless he claims under or by authority of such a person<sup>2</sup>.

1 *Jones v Chapman* (1849) 2 Exch 803, Ex Ch; *Roberts v Tayler* (1845) 1 CB 117 at 126 per Cresswell J; *Ewer v Jones* (1846) 9 QB 623; *Delaney v TP Smith Ltd* [1946] KB 393, [1946] 2 All ER 23, CA. Cf *Cary v Holt* (1745) 11 East 70n; *Holmes v Newlands* (1839) 11 Ad & El 44; *Ryan v Clark* (1849) 14 QB 65.

2 *Glenwood Lumber Co v Phillips* [1904] AC 405, PC; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84. Cf *Chambers v Donaldson* (1809) 11 East 65. The defendant may rely upon an authority which he in fact had, although he did not purport to rely upon it at the time of the trespass: see *Trent v Hunt* (1853) 9 Exch 14; *Phillips v Whitsed* (1860) 2 E & E 804.

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### 580. Leave and licence.

It is a good defence to a claim of trespass to land for the defendant to plead and prove that he entered on the land by the leave and licence of the claimant<sup>1</sup>. If the person in possession of land gives to another person licence to enter on the land, then, so long as the licence continues and the entry is justified by the licence, the person to whom the licence was given cannot be treated as a trespasser<sup>2</sup>.

A person who has been let into possession of land by the person entitled to such possession has the right to occupy the land as a licensee until the licence is revoked by a competent authority, although he has no estate in the land<sup>3</sup>. An entry on land for the purpose of hunting or similar purposes is lawful if it is with the express or tacit consent of the person in possession of the land, but is unlawful if there is no such consent<sup>4</sup>.

At common law, a licence to enter land which is not coupled with the grant of an interest in the land is revocable at will<sup>5</sup>. However, if such a licence arises by virtue of a contract between the claimant and the defendant<sup>6</sup> it is a matter of construction of the contract whether the licence is revocable or not<sup>7</sup>. In any case a licensee whose licence has been revoked has a right to a reasonable time to vacate the land after the revocation of the licence, and if the licence is to put goods on land of the licensor, the licence cannot be revoked without allowing the licensee reasonable time to remove the goods<sup>8</sup>.

If the owner of land gives permission for the doing of an act on his land and that act is completed, then, generally speaking, he will be too late to complain of it and the owner's proprietary right will to that extent be extinguished<sup>9</sup>.

A licence coupled with a grant of an interest in the land is not revocable<sup>10</sup>.

In order that a licence may be a defence to a claim of trespass, the defendant must not have exceeded that which the licence allows; thus, a licence to enter a dwelling house and seize goods does not justify breaking and entering, unless a demand for the goods is first made and an intimation given of the authority under which the demand is made<sup>11</sup>; and a licence to enter into a house or onto land does not justify an entry except in the usual way<sup>12</sup>. However, where the licensee has done nothing on the premises which he was not entitled to do, his motives in entering are immaterial<sup>13</sup>.

1 As to a licence to enter on land see **EASEMENTS AND PROFITS A PRENDRE; LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 9 et seq. Where a landlord has covenanted to do repairs a licence to enter to do the repairs is implied: see *Edmonton Corp v WM Knowles & Son Ltd* (1961) 60 LGR 124; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 415. Where land is jointly occupied a licence given without authority by one occupier will not bind other occupiers, and an entrant under the licence will be a trespasser against those others: *Ferguson v Welsh* [1987] 3 All ER 777 at 785, [1987] 1 WLR 1553 at 1563, HL, per Lord Goff of Chieveley. When a householder lives in a dwelling house to which there is a garden in front and does not lock the garden gate,

there is an implied licence to any member of the public, including a policeman, who has lawful reason for doing so, to proceed from the gate to the front or back door, and to inquire whether he may be admitted and to conduct his lawful business. If the licence is withdrawn he is not a trespasser during the reasonable time which he takes to leave the premises: *Robson v Hallett* [1967] 2 QB 939 at 954, [1967] 2 All ER 407 at 414, DC, per Diplock LJ. Cf *Brunner v Williams* (1975) 73 LGR 266, DC, where it was held that a weights and measures inspector has no implied licence to enter a house garden to see whether a coal dealer is delivering coal there in breach of the Weights and Measures Act 1963 (repealed). A wife's inquiry agent has no implied licence to enter the home of her husband who is living apart from her: *Jolliffe v Willmetts & Co* [1971] 1 All ER 478.

2 *Kavanagh v Gudge* (1844) 7 Man & G 316; *Knapp v London, Chatham and Dover Rly Co* (1863) 2 H & C 212. Cf *Hyde v Graham* (1862) 1 H & C 593 (locking of gate impliedly revoking licence). The plea must cover all the alleged acts of trespass: *Hayward v Grant* (1824) 1 C & P 448. A plea of leave and licence means leave and licence in fact; a licence in law must be expressly pleaded: *Moxon v Savage* (1860) 2 F & F 182. A licence is not implied by law to the purchaser of goods, although sold under an execution or distress, to enter upon the premises of the former owner and take them away, even if they have remained there with his consent: *Williams v Morris* (1841) 8 M & W 488.

3 *Littleton v M'Namara* (1875) IR 9 CL 417.

4 *Paul v Summerhayes* (1878) 4 QBD 9; and see **ANIMALS** vol 2 (2008) PARAS 716, 779. See also *League Against Cruel Sports v Scott* [1986] QB 240, [1985] 2 All ER 489.

5 *Wood v Leadbitter* (1845) 13 M & W 838 at 844 per Alderson B; *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477, CA; *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA (licence to discharge effluent under land). Where a spouse has no proprietary rights in the spousal home, a right of occupation may arise independently of any licence from the other spouse: see *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, [1965] 2 All ER 472, HL; and the Family Law Act 1996 Pt IV (ss 30-63).

6 For the position where one of the parties is an assignee of the original licensee see *Clore v Theatrical Properties Ltd and Westby & Co Ltd* [1936] 3 All ER 483, CA; *Ashburn Anstalt v WJ Arnold & Co* [1989] Ch 1, [1988] 2 All ER 147, CA.

7 See **CONTRACT** vol 9(1) (Reissue) PARA 981; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 10. In regard to contractual licences it was said in *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA, that since the Judicature Acts, *Wood v Leadbitter* (1845) 13 M & W 838 was no longer good law: see *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 at 7-10, CA, per Buckley LJ. This view was approved obiter in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL (implied power of revocation in the contract), where it was held that where a contractual licence is granted for a definite purpose and for a limited period it will be irrevocable until the purpose is achieved: *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 189, [1947] 2 All ER 331 at 335-336, HL, per Viscount Simon, and at 194 and 338 per Lord Porter. Cf *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477, CA (licence revoked); said to be inconsistent with later authority and no longer good law in *Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA; but it may be that the actual result was justifiable on the facts: see *Hounslow Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233 at 250, [1970] 3 All ER 326 at 339 per Megarry J.

8 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 10. See also *Robson v Hallett* [1967] 2 QB 939 at 954, [1967] 2 All ER 407 at 414, DC, per Diplock LJ; *Minister of Health v Bellotti* [1944] KB 298 at 306, [1944] 1 All ER 238 at 243-244, CA, per Lord Greene MR; *Cornish v Stubbs* (1870) LR 5 CP 334; *Mellor v Watkins* (1874) LR 9 QB 400; *Canadian Pacific Rly Co v R* [1931] AC 414, PC; *Australian Blue Metal Ltd v Hughes* [1963] AC 74, [1962] 3 All ER 335, PC. In some cases reasonable notice as well as reasonable time may be required: *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 205-206, [1947] 2 All ER 331 at 344-345, HL, per Lord MacDermott. See also *Issac v Hotel de Paris Ltd* [1960] 1 All ER 348, [1960] 1 WLR 239, PC. If inadequate time is given the revocation is still valid: see *Minister of Health v Bellotti* [1944] KB 298, [1944] 1 All ER 238, CA; *Dorling v Honnor Marine Ltd* [1964] Ch 560 at 567, [1963] 2 All ER 495 at 502 per Cross J (revsd on another point [1965] Ch 1, [1964] 1 All ER 241, CA). However, damages may be recovered for any damage resulting from the lack of reasonable notice or time: *Aldin v Latimer Clarke, Muirhead & Co* [1894] 2 Ch 437.

9 *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA. This may be so even though the owner was unaware of his proprietary right at the time he gave the permission: *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384 at 401, [1959] 2 All ER 651 at 659, CA, per Lord Evershed MR. See also *Liggins v Inge* (1831) 7 Bing 682; *Feltham v Cartwright* (1839) 5 Bing NC 569; *Davies v Marshall* (1861) 10 CBNS 697.

10 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 13. A chattel interest may suffice: see *James Jones & Sons Ltd v Tankerville* [1909] 2 Ch 440 at 442 per Parker J. See also *Thomas v Sorrell* (1673) Vaugh 330 at 351; *Doe d Hanley v Wood* (1819) 2 B & Ald 724 at 738; *Vaughan v Hampson* (1875) 33 LT 15. See further

*Chandler v Kerley* [1978] 2 All ER 942, [1978] 1 WLR 693, CA; *Hardwick v Johnson* [1978] 2 All ER 935, [1978] 1 WLR 683, CA.

11 *Aikins v Brunton* (1866) 14 WR 636.

12 *Ancaster v Milling* (1823) 2 Dow & Ry KB 714.

13 *Byrne v Kinematograph Renters Society Ltd* [1958] 2 All ER 579 at 592, [1958] 1 WLR 762 at 776 per Harman J.

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### 581. Exercise of legal right.

It is a good defence to a claim of trespass for the defendant to plead and prove that he entered on land in the exercise of a legal right, whether statutory<sup>1</sup> or otherwise<sup>2</sup>. It seems that a person may be entitled to enter on the land of another, and to do acts there which otherwise would amount to a trespass, if such entry and acts are reasonably necessary for the preservation of the property of the person entering or of the person whose land is entered, or for the preservation of life, and if the entry is made and the acts are done in a reasonable manner<sup>3</sup>.

It is a good defence to a claim of trespass for the defendant to plead and prove that he committed the act complained of in the lawful execution of legal process<sup>4</sup>, or in the lawful carrying out of a lawful distress<sup>5</sup>.

The defence of justification must be specially pleaded and must cover all the acts done<sup>6</sup>.

1 *Knapp v London, Chatham and Dover Rly Co* (1863) 2 H & C 212. As to the powers of entry of constables generally see **POLICE** vol 36(1) (2007 Reissue) PARA 482. Numerous statutes confer rights of entry upon private land: see eg the Atomic Energy Act 1946 s 5; and **FUEL AND ENERGY** vol 19(3) (2007 Reissue) PARA 1515. As to access orders to allow entry onto land to allow the carrying out of works reasonably necessary for the preservation of adjoining of adjacent land, or any part of it, see the Access to Neighbouring Land Act 1992; and **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 112 et seq.

2 Eg to exercise a right to fish (*Richardson v Orford Corpn* (1793) 2 Hy Bl 182, Ex Ch; *Mannall v Fisher* (1859) 5 CBNS 856), to hunt and shoot (*Wickham v Hawker* (1840) 7 M & W 63; cf *Moore v Earl of Plymouth* (1817) 7 Taunt 614 (affd (1819) 3 B & Ald 66); *Pickering v Noyes* (1825) 4 B & C 639; *Pannell v Mill* (1846) 3 CB 625), to exercise a right of way (*Holt v Daw* (1851) 16 QB 990), to dig for minerals (*Earl of Cardigan v Armitage* (1823) 2 B & C 197; *Bassett v Mitchell* (1831) 2 B & Ad 99; *Roberts v Davey* (1833) 4 B & Ad 664; *Dand v Kingscote* (1840) 6 M & W 174; *Clayton v Corby* (1842) 2 QB 813; *Rogers v Taylor* (1857) 1 H & N 706; *Duke of Hamilton v Graham* (1871) LR 2 Sc & Div 166; cf *Smart v Morton* (1855) 5 E & B 30), to cut turf (*Fitzpatrick v Verschoyle* [1912] 1 IR 8), or under certain circumstances to abate a nuisance (*Jones v Williams* (1843) 11 M & W 176; *Turner v Ringwood Highway Board* (1870) LR 9 Eq 418; *Earl of Lonsdale v Nelson* (1823) 2 B & C 302 at 311 per Best J). See also *Phypers v Eburn* (1836) 3 Bing NC 250; *Griffin v Dighton* (1863) 5 B & S 93, Ex Ch. As to use of the highway see *Harrison v Duke of Rutland* [1893] 1 QB 142, CA; *Hickman v Maisey* [1900] 1 QB 752, CA; *Randall v Tarrant* [1955] 1 All ER 600, [1955] 1 WLR 255, CA; *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL; and PARA 566. See also *Secretary of State for Defence v Percy* [1999] 1 All ER 732 (there is no legal right for a member of the public to enter onto private land via a public footpath for the purpose of removing an illegal byelaw notice).

3 *Cope v Sharpe (No 2)* [1912] 1 KB 496, CA (entry on land by tenant of sporting rights to prevent fire spreading). See also *Maleverer v Spinke* (1537) 1 Dyer 35b at 36b; *Howard v Frith* (1666) 2 Keb 58 (entry to preserve life); *Handcock v Baker* (1800) 2 Bos & P 260 (breaking and entering to prevent murder); cf *Kirk v Gregory* (1876) 1 ExD 55 (removal of goods for their preservation). The owner of a swarm of bees has no right to follow the bees onto the land of another: *Kearry v Pattinson* [1939] 1 KB 471, [1939] 1 All ER 65, CA. Homelessness does not constitute the sort of emergency in which the defence of necessity can be invoked: see *Southwark London Borough Council v Williams* [1971] Ch 734 at 743-744, [1971] 2 All ER 175 at 179, CA, per Lord Denning MR. See also PARA 584.

4 See eg **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARA 57 et seq; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 873. See further *Semayne's Case* (1604) 5 Co Rep 91a; *Cheasley v Barnes* (1808) 10 East 73; *Shorland v Govett* (1826) 5 B & C 485; *Sowell v Champion* (1837) 6 Ad & El 407; *Pugh v Griffith* (1838) 7 Ad & El 827. Cf *Perkins v Plympton* (1831) 7 Bing 676; *Carnaby v Welby* (1838) 8 Ad & El 872; *Jarman v Hooper* (1843) 6 Man & G 827; *Playfair v Musgrove* (1845) 14 M & W 239; *Percival v Stamp* (1853) 9 Exch 167; *Edwards v Hodges* (1855) 15 CB 477; *Melling v Leak* (1855) 16 CB 652.

5 See *Long v Clarke* [1894] 1 QB 119 at 121, CA, per Lord Esher MR; and also **DISTRESS** vol 13 (2007 Reissue) PARA 907 et seq.

6 *Smith v Shirley* (1846) 3 CB 142; *Curlewis v Laurie* (1848) 12 QB 640; *Hope v Osborne* [1913] 2 Ch 349. Cf *Taylor v Cole* (1789) 3 Term Rep 292 (affd (1791) 1 Hy Bl 555); *Taylor v Smith* (1816) 7 Taunt 156. If the defendant has sufficient legal justification for the entry, it is immaterial that he claims at the time to enter for another cause: *Crowther v Ramsbottom* (1798) 7 Term Rep 654.

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## 582. Acquiescence.

Mere delay by the claimant in complaining of the action of the defendant is not of itself sufficient to establish the defence of acquiescence or estoppel<sup>1</sup>. It must further be shown that the defendant had been misled to his detriment so that it would be unconscionable for the claimant to assert his rights<sup>2</sup>. But the claimant is not debarred by acquiescence from enforcing legal rights of which he was unaware at the relevant time<sup>3</sup>.

1 As to estoppel generally see **CIVIL PROCEDURE; ESTOPPEL**.

2 *Jones v Stones* [1999] 1 WLR 1739, 78 P & CR 293, CA; *Perlman v Rayden* [2004] EWHC 2192 (Ch), [2004] 43 EG 142 (CS), [2005] 1 P & CR DG10. See also *Willmott v Barber* (1880) 15 ChD 96; *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA; *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, [1981] 1 WLR 1265, CA; *Taylor's Fashions Ltd v Liverpool Victoria Trustee Co Ltd* [1982] QB 133n, [1981] 1 All ER 897, CA.

3 *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA.

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## 583. Entry to retake or remove goods.

If a person unlawfully takes the goods of another and puts them on his own land, the owner of the goods is entitled to enter immediately on the land for the purpose of retaking his own goods<sup>1</sup>. If a person wrongfully places his own goods on the land of another, the occupier of the land is entitled to enter the land of the owner of the goods for the purpose of depositing the goods there<sup>2</sup>. A former tenant who is no longer possessed of the premises demised cannot justify re-entering them to recover chattels left behind<sup>3</sup>.

1 *Patrick v Colerick* (1838) 3 M & W 483; *Webb v Beavan* (1844) 6 Man & G 1055. The principle does not apply where the goods are put on land possessed by a third party, or where they are fixed to the land: see *Anthony v Haney* (1832) 8 Bing 186. See also *Wood v Manley* (1839) 11 Ad & El 34 (entry under contract for the sale of goods); *Burridge v Nicholls* (1861) 6 H & N 383 (county court treasurer's right to possession of the accounts). Cf *Blades v Higgs* (1861) 10 CBNS 713 (retaking goods and trespass to the person); and **TORT** vol 45(2) (Reissue) PARA 670.

2 *Rea v Sheward* (1837) 2 M & W 424.

3 *Wilde v Waters* (1855) 24 LJCP 193 at 195 per Maule J.

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#### **584. Necessity.**

Entry onto another person's land may be justified by the defence of necessity, provided that there was no negligence on the defendant's part creating or contributing to the necessity<sup>1</sup>. For the defence to be available, the danger faced by the defendant must be immediate, obvious and such that a reasonable person would conclude that there was no alternative to the act of trespass<sup>2</sup>.

1 *Rigby v Chief Constable of Northamptonshire* [1985] 2 All ER 985, [1985] 1 WLR 1242.

2 *Monsanto v Tilly* [1999] NLJR 1833, [1999] All ER (D) 1321, [2000] Env LR 313, CA. Homelessness does not constitute the sort of emergency in which the defence of necessity can be invoked: see *Southwark London Borough Council v Williams* [1971] Ch 734 at 743-744, [1971] 2 All ER 175 at 179, CA, per Lord Denning MR.

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#### **585. Claim statute-barred.**

A claim of trespass to land is barred by lapse of the statutory period of limitation, which, except in certain specified cases, is six years from the accrual of the cause of action<sup>1</sup>.

1 See the Limitation Act 1980 s 2; and **LIMITATION PERIODS** vol 68 (2008) PARA 993. As to the extension and postponement of limitation periods see **LIMITATION PERIODS** vol 68 (2008) PARA 1168 et seq.

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### **E. REMEDIES**

#### **586. Expulsion.**

If a trespasser peaceably enters or is on land, the person who is in, or entitled to, possession may request him to leave, and if he refuses to leave may remove him from the land, using no more force than is reasonably necessary<sup>1</sup>. However, if a trespasser enters with force and violence, the person in possession may remove him without a previous request to depart<sup>2</sup>. An owner of property is also entitled to take reasonable steps to prevent trespassers from entering his property<sup>3</sup>. If the force or violence used in turning out a trespasser is excessive, the person who used such force himself commits a trespass upon the person of the person removed<sup>4</sup>. To

justify the expulsion of a trespasser, the person who uses force must be in possession or acting under the authority of the person in possession<sup>5</sup>.

If a trespasser erects a building on the land of another, the person who is entitled to the possession of the land may pull down the building, even though the trespasser is in it<sup>6</sup>.

The police also have statutory powers to remove trespassers on land in certain circumstances<sup>7</sup>.

1 *Hall v Davis* (1825) 2 C & P 33; *Thomas v Marsh and Nest* (1833) 5 C & P 596; *Webster v Watts* (1847) 11 QB 311; *Shaw v Chairtie* (1850) 3 Car & Kir 21 at 25 per Lord Campbell CJ; *Jackson v Courtenay* (1857) 8 E & B 8, Ex Ch; *Scott v Matthew Brown & Co Ltd* (1884) 51 LT 746; *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720, CA. It is no part of the duty of a police constable to turn out a peaceable trespasser unless he has committed an offence: see *Wheeler v Whiting* (1840) 9 C & P 262; cf *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458, [1981] 3 All ER 826, CA (police may assist expulsion so as to prevent a breach of the peace), distinguished in *Percy v DPP* [1995] 1 WLR 1382, DC (non-violent trespass; no real risk of a breach of the peace); and see PARA 591.

2 *Weaver v Bush* (1798) 8 Term Rep 78; *Tullay v Reed* (1823) 1 C & P 6; *Polkinhorn v Wright* (1845) 8 QB 197.

3 See PARA 533.

4 *Collins v Renison* (1754) Say 138; *Gregory v Hill* (1799) 8 Term Rep 299; *Simpson v Morris* (1813) 4 Taunt 821; *Johnson v Northwood* (1817) 7 Taunt 689; *Moriarty v Brooks* (1834) 6 C & P 684, Ex Ch; *Oakes v Wood* (1837) 2 M & W 791. See also *Green v Bartram* (1830) 4 C & P 308; *Ball v Axten* (1866) 4 F & F 1019 (false imprisonment). As to trespassers being injured by animals on the land see **ANIMALS** vol 2 (2008) PARA 749. As to spring-guns, mantraps etc see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 131. As to dog spears, traps etc see **ANIMALS** vol 2 (2008) PARA 783.

5 *Monks v Dykes* (1839) 4 M & W 567; *Holmes v Bagge* (1853) 1 E & B 782.

6 *Burling v Read* (1850) 11 QB 904; *Davies v Williams* (1851) 16 QB 546. It is not lawful to pull down an occupied dwelling house on one's land without prior notice to the occupier: see *Perry v Fitzhowe* (1846) 8 QB 757; *Jones v Jones* (1862) 1 H & C 1. See also the further protection in the Protection from Eviction Act 1977 ss 1-3. Cf *Jones v Foley* [1891] 1 QB 730, DC; and, on the right to lop overhanging branches, *Lemmon v Webb* [1895] AC 1, HL.

7 See the Criminal Justice and Public Order Act 1994 ss 61, 62A, 63; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 590. As to the police power to remove persons committing or participating in aggravated trespass see the Criminal Justice and Public Order Act 1994 ss 68, 69; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 592.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(i) Trespass to Land/E. REMEDIES/587. Forcible entry.

### 587. Forcible entry.

The principle at common law that a person entitled to the immediate possession of land may enter and, in a civil claim, may justify the use of so much force as is necessary to effect entry and to expel an intruder, provided the force used is reasonable<sup>1</sup>, is curtailed in respect of premises let as a dwelling by the statutory restriction that, while any person is lawfully residing in the premises or part of them, a right of re-entry or forfeiture can be enforced only by proceedings in court<sup>2</sup>.

The fact that a person (other than a displaced residential occupier or a protected intended occupier, or a person acting on behalf of such an occupier) has any interest in or right to possession or occupation of any premises does not constitute lawful authority so as to excuse him from an offence of using or threatening violence for the purpose of securing entry into any premises<sup>3</sup>.



1 See *Hemmings v Stoke Poges Golf Club Ltd* [1920] 1 KB 720, CA.

2 See the Protection from Eviction Act 1977 s 2; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 653. For the procedure relating to possession claims see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 656 et seq. As to enforcement of an order made by a county court in such proceedings see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 8B (added by SI 2001/2685).

3 See the Criminal Law Act 1977 s 6(1), (1A) (2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 602; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 652.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(i) Trespass to Land/E. REMEDIES/588. Distress damage feasant.

### 588. Distress damage feasant.

If any chattel<sup>1</sup> is unlawfully on the land of a person and is doing damage, the person entitled to the possession of the land may, instead of bringing a claim for trespass, distrain the chattel doing the damage<sup>2</sup>.

1 See *Ambergate, Nottingham and Boston and Eastern Junction Rly Co v Midland Rly Co* (1853) 2 E & B 793, where the right was held to apply to an engine obstructing the railway. The common law right to seize and detain any animal by way of distress damage feasant was abolished and replaced by the Animals Act 1971 s 7: see **ANIMALS** vol 2 (2008) PARA 758 et seq.

2 Some damage must be shown; it need not be physical damage to the land or anything on it, but the mere costs of the distress are not sufficient: see *Arthur v Anker* [1997] QB 564, [1996] 3 All ER 783, CA (held not applicable to wheel clamping of vehicle parked on private land without authorisation).

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(i) Trespass to Land/E. REMEDIES/589. Damages.

### 589. Damages.

In a claim of trespass, if the claimant proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss<sup>1</sup>. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss<sup>2</sup>. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use<sup>3</sup>. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded<sup>4</sup>. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased<sup>5</sup>.

Although damages are normally awarded only for loss that has already been suffered, in an appropriate case the court may award damages in lieu of an injunction in respect of anticipated loss which the claimant has not yet sustained<sup>6</sup>.

1 See **DAMAGES** vol 12(1) (Reissue) PARA 870.

2 See **DAMAGES** vol 12(1) (Reissue) PARAS 868, 870-872.

3 See **DAMAGES** vol 12(1) (Reissue) PARA 872. This award may be made even though the claimant may have been unable to let the premises: *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240, [1979] 1 WLR 285, CA; see also *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841 at 845, [1995] 1 WLR 713 at 718, PC (award based on use of holiday apartments every day of the year, notwithstanding low levels of occupancy at certain times). A claim for damages proper may be appropriate where property is subject to concessionary rents and full market value would not give a proper measure of loss or gain: *Ministry of Defence v Ashman* (1993) 25 HLR 513 at 519-520, CA, per Hoffmann LJ; *Ministry of Defence v Thompson* (1993) 25 HLR 552, CA. Where there has been wrongful occupation the claimant may sue for recovery of the land together with a claim for mesne profits or claim mesne profits alone if he has re-entered or his interest has determined: *Harris v Mulkern* (1875) 1 ExD 31; *Southport Tramways Co v Gandy* [1897] 2 QB 66, CA. Despite its name, mesne profits are not confined to the defendant's actual gains but extend also to the claimant's loss: *Dunn v Large* (1783) 3 Doug KB 335.

4 *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA, applying *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. In *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA, a tenant was awarded exemplary damages against his landlord who evicted him. However, where the landlord had already been fined and did not make a profit from his trespass his tenant was not awarded exemplary (but only aggravated) damages: *Devonshire v Jenkins* (1979) 129 NLJ 849. See also *Branchett v Beaney* [1992] 3 All ER 910, [1992] 2 EGLR 33, CA. See further **DAMAGES** vol 12(1) (Reissue) PARAS 1115-1117.

5 *Bisney v Swanston* (1972) 225 Estates Gazette 2299, CA; *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA. As to aggravated damages see **DAMAGES** vol 12(1) (Reissue) PARA 1114.

6 See *Jaggard v Sawyer* [1995] 2 All ER 189, [1995] 1 WLR 269, CA; and also **DAMAGES** vol 12(1) (Reissue) PARA 1123 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(i) Trespass to Land/E. REMEDIES/590. Injunction and declaration.

### 590. Injunction and declaration.

The court may grant an injunction, which may be mandatory<sup>1</sup>, to prevent a continuance or threatened repetition of a trespass<sup>2</sup>; and where a trespass is threatened, although not committed, the court may prevent it by injunction<sup>3</sup>. Where the trespass is of a trifling nature, or where damages are a sufficient remedy, or where the granting of an injunction would be oppressive, an injunction may be refused<sup>4</sup>. Where the defendant claims a right to enter upon the land in question, the court, in addition to or in substitution for damages or an injunction, may make a declaration concerning that claim<sup>5</sup>.

1 *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343.

2 See **CIVIL PROCEDURE** vol 11 (2009) PARA 442. As the presumptive entitlement to an injunction in respect of the violation of a common law right see **CIVIL PROCEDURE** vol 11(2009) PARA 357. Considerations of public welfare may justify the suspension of the injunction, but not its denial altogether: *Price's Patent Candle Co v LCC* [1908] 2 Ch 526 at 544, CA, per Cozens-Hardy MR. The injunction should not be suspended simply because no damage is suffered and the trespass will not last indefinitely: see *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P & CR 104, not following *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483, [1970] 1 WLR 411, considered wrongly decided in *Jaggard v Sawyer* [1995] 2 All ER 189 at 199, [1995] 1 WLR 269 at 278, CA, per Sir Thomas Bingham MR.

3 See **CIVIL PROCEDURE** vol 11 (2009) PARA 442.

4 See **CIVIL PROCEDURE** vol 11 (2009) PARAS 442-443. See also *Armstrong v Sheppard and Short Ltd* [1959] 2 QB 384, [1959] 2 All ER 651, CA; *Llandudno UDC v Woods* [1899] 2 Ch 705; *Behrens v Richards* [1905] 2 Ch 614. In these cases an injunction was refused because the injury was trivial but in other cases an injunction was granted despite this factor: see *Patel v WH Smith (Eziot) Ltd* [1987] 2 All ER 569, [1987] 1 WLR 853, CA (vehicle parking); *Anchor Brewhouse Developments Ltd v Berkley House Docklands Development Ltd* [1987] 2 EGLR 173, 38 BLR 82 (swinging tower crane). A possible consideration is that the activities in the first three cases (ie drainage, religious services and access to a beach) all had elements of public interest or benefit not present in the latter two cases.

5 *Harrison v Duke of Rutland* [1893] 1 QB 142, CA; *Llandudno UDC v Woods* [1899] 2 Ch 705; *Behrens v Richards* [1905] 2 Ch 614. As to declarations see CPR 40.20; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1145.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(i) Trespass to Land/E. REMEDIES/591. Criminal liability in connection with trespass to land.

### **591. Criminal liability in connection with trespass to land.**

Though trespass to land is not in itself a criminal offence, many statutes provide that specific forms of trespass<sup>1</sup> or trespass on specific types of property<sup>2</sup> are criminal or are components of more widely defined offences<sup>3</sup>.

1 See eg the Criminal Law Act 1977 s 6 (violence for securing entry), s 7 (adverse occupation of residential premises), s 8 (trespassing with a weapon of offence); the Criminal Justice and Public Order Act 1994 s 61 (powers to remove trespassers on land), s 68 (aggravated trespass); the Firearms Act 1968 s 20 (trespassing with a firearm); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 681. As to proof of aggravated trespass see *DPP v Barnard* (1999) Times, 9 November, DC (mere trespass not sufficient).

The police may, but are not compelled to, assist in the removal of trespassers in order to prevent a breach of the peace: see *R v Chief Constable of Devon and Cornwall, ex p Central Electricity Generating Board* [1982] QB 458, [1981] 3 All ER 826, CA, distinguished in *Percy v DPP* [1995] 3 All ER 124, [1995] 1 WLR 1382, DC (non-violent trespass; no real risk of a breach of the peace).

2 Eg railway property (see the Railway Regulation Act 1840 s 16; the Regulation of Railways Act 1868 s 23; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 407 et seq), some gardens (see the Town Gardens Protection Act 1863 s 5), diplomatic premises, consular premises and private residences of persons entitled to international inviolability (see the Criminal Law Act 1977 s 9; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 605); residential property generally (see the Criminal Law Act 1977 s 7; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 603).

3 Offences which may include trespass as a component include: burglary (see the Theft Act 1968 s 9; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 294); trespassory assembly (see the Public Order Act 1986 ss 14A-14C; and *DPP v Jones* [1999] 2 AC 240, [1999] 2 All ER 257, HL). See also the Game Act 1831 ss 30, 31; and the Night Poaching Act 1828 ss 1, 9 (as to which see further the Night Poaching Act 1844 s 1; and the Criminal Law Act 1977 s 15(4)).

As to the general abolition of the offence of conspiracy to trespass at common law and the limited exceptions to this see the Criminal Law Act 1977 s 5; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 65 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(ii) Nuisance and Associated Torts/592. Private nuisance.

## **(ii) Nuisance and Associated Torts**

### **592. Private nuisance.**

A nuisance which interferes with a person's use or enjoyment of his land or of some right connected with land is a private nuisance and as such an actionable tort<sup>1</sup>. Private nuisances are of three kinds: nuisances by encroachment to another's land; nuisance by direct physical injury to a neighbour's land; and nuisance by interference with another's quiet enjoyment of his land<sup>2</sup>. In most cases the nuisance results from an activity conducted by the defendant on his land, but this is not an essential ingredient of the tort<sup>3</sup>; the defendant may be liable for continuing or

adopting a private nuisance that was created by a trespasser on his land or natural forces<sup>4</sup>. In the absence of an easement<sup>5</sup>, however, the mere presence of a building which interferes with a person's enjoyment of his land does not constitute a private nuisance<sup>6</sup>. The normal remedy for a private nuisance is an injunction to prevent the continuation or repetition of the nuisance, and damages in respect of loss sustained<sup>7</sup>.

1 See **NUISANCE** vol 78 (2010) PARA 107 et seq. As to public nuisance, which is not specifically a tort to land, see PARA 494.

2 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 695, [1997] 2 All ER 426 at 441, HL, per Lord Lloyd of Berwick.

3 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 699, [1997] 2 All ER 426 at 445, HL, per Lord Lloyd of Berwick (approving *Bank of New Zealand v Greenwood* [1984] 1 NZLR 525 at 532 per Hardie Boys J).

4 See eg *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, [1940] 3 All ER 349, HL (act of trespasser); *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485, [1980] 1 All ER 17, CA (land movement); *Goldman v Hargrave* [1967] 1 AC 645, [1966] 2 All ER 989, PC (fire).

5 As to easements see **EASEMENTS AND PROFITS A PRENDRE**.

6 *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL (construction of building interfering with neighbouring householders' reception of television signals was not an actionable private nuisance). See **NUISANCE** vol 78 (2010) PARA 128.

7 See **NUISANCE** vol 78 (2010) PARA 230 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(ii) Nuisance and Associated Torts/593. Right to sue in private nuisance.

### **593. Right to sue in private nuisance.**

Private nuisance is a tort directed against a person's enjoyment of rights over land<sup>1</sup>. A claim for private nuisance can therefore be brought only by a person who has a right to the land affected<sup>2</sup>. Ordinarily the proper claimant will be the person who has actual and exclusive possession of the land, along with the right to such possession<sup>3</sup>; for example, a freeholder or tenant<sup>4</sup>, or a licensee with exclusive possession<sup>5</sup>. Authority to be in possession is not essential, however, and a claim in private nuisance may lie at the suit of a person who has exclusive possession of land without the consent of the owner or lawful occupier<sup>6</sup>; there is no defence of *jus tertii*<sup>7</sup> in a claim for private nuisance<sup>8</sup>. A person with a reversionary interest in land can sue in private nuisance where the act or omission complained of is sufficiently enduring to damage his reversion<sup>9</sup>.

1 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 687, [1997] 2 All ER 426 at 434, HL, per Lord Goff of Chieveley (citing Newark 'The Boundaries of Nuisance' (1949) 65 LQR 480 at 482). See also **NUISANCE** vol 78 (2010) PARA 107.

2 *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426, HL. See also *Tate & Lyle Industries Ltd v GLC* [1983] 2 AC 509, [1983] 1 All ER 1159, HL; and **NUISANCE** vol 78 (2010) PARA 107.

3 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688, 691, [1997] All ER 426 at 435, 438, HL, per Lord Goff of Chieveley, at 695 and 441 per Lord Lloyd of Berwick, at 703, 708 and 449, 453 per Lord Hoffmann, at 717 and 462 per Lord Cooke of Thorndon, and at 724 and 468 per Lord Hope of Craighead.

4 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688, [1997] 2 All ER 426 at 435, HL, per Lord Goff of Chieveley.

5 *Newcastle-under-Lyme Corpn v Wolstanton Ltd* [1947] Ch 92 at 106-108, [1946] 2 All ER 447 at 455-456 per Evershed J; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688, [1997] All ER 426 at 435, HL, per Lord Goff of Chieveley, at 695 and 441 per Lord Lloyd of Berwick, at 717 and 462 per Lord Cooke of Thorndon, and at 724 and 468 per Lord Hope of Craighead.

6 *Foster v Warblington UDC* [1906] 1 KB 648, CA; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688, 691, [1997] 2 All ER 426 at 435, 438, HL, per Lord Goff of Chieveley.

7 As to the defence of *jus tertii* see also PARA 579 (in respect of trespass to land) and **TORT** vol 45(2) (Reissue) PARAS 644, 678 (in respect of wrongs against interests in goods).

8 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688, [1997] 2 All ER 426 at 435, HL, per Lord Goff of Chieveley.

9 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688, 691, [1997] 2 All ER 426 at 435, 438, HL, per Lord Goff of Chieveley, at 708 and 453 per Lord Hoffmann, at 724 and 468 per Lord Hope of Craighead. Cf the position in relation to damage to a reversionary interest in goods: see PARA 606.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(ii) Nuisance and Associated Torts/594. The rule in *Rylands v Fletcher*.

#### 594. The rule in *Rylands v Fletcher*.

A person who for his own purposes brings onto his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he fails to do so, he is *prima facie* liable for the damage which is the natural consequence of its escape<sup>1</sup>. Liability under this rule is a liability in private nuisance, and therefore arises only in respect of damage to interests in land<sup>2</sup>. It is a strict liability in the sense that it is no defence for the defendant to show that the thing escaped independently of any wilful act or default on his part<sup>3</sup>, or despite his exercise of all possible care and precautions to prevent it<sup>4</sup>. Liability, however, will not arise unless damage of the relevant type was foreseeable to the defendant if the things collected on his land were to escape<sup>5</sup>.

The rule applies only to a non-natural user of the land<sup>6</sup>. It does not apply:

- 32 (1) to things naturally on the land<sup>7</sup>;
- 33 (2) to things not likely to do mischief if they escape<sup>8</sup>;
- 34 (3) where there is no escape from the land on which things were collected<sup>9</sup>;
- 35 (4) where the escape is due to an act of God, the act of a stranger or the default of the claimant<sup>10</sup>;
- 36 (5) where the thing which escapes is present by consent of the person injured<sup>11</sup>;
- 37 (6) in certain cases where there is statutory authority<sup>12</sup>.

1 *Rylands v Fletcher* (1868) LR 3 HL 330. See **NUISANCE** vol 78 (2010) PARA 148 et seq.

2 *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL; *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1, [2004] 1 All ER 589.

3 *Rylands v Fletcher* (1868) LR 3 HL 330; *Smith v Fletcher* (1872) LR 7 Exch 305 (revsd on other grounds (1874) LR 9 Exch 64, Ex Ch); *Humphries v Cousins* (1877) 2 CPD 239. In the latter decision, the defendant was held liable even though he had no knowledge of the existence of the thing that escaped, but this seems inconsistent with the modern law: see *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264 at 301, [1994] 1 All ER 53 at 73, HL, per Lord Goff of Chieveley.

4 *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL.

5 *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL.

6 See eg *Read v J Lyons & Co Ltd* [1947] AC 156, [1946] 2 All ER 471, HL; *Cambridge Water Co Ltd v Eastern Counties Leather plc* [1994] 2 AC 264, [1994] 1 All ER 53, HL (storage of substantial quantities of chemicals: an 'almost classic case' of non-natural user of land, even if on industrial premises in an industrial complex); *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61, [2004] 2 AC 1, [2004] 1 All ER 589 (piping of mains water supply to storage tanks was a routine function not raising any special hazard, and so a natural or ordinary user of land).

7 See **NUISANCE** vol 78 (2010) PARA 149.

8 See **NUISANCE** vol 78 (2010) PARA 150.

9 See **NUISANCE** vol 78 (2010) PARA 151.

10 See **NUISANCE** vol 78 (2010) PARA 152.

11 See **NUISANCE** vol 78 (2010) PARA 153.

12 See **NUISANCE** vol 78 (2010) PARA 154.

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### **595. Liability of occupier of premises for fire.**

The occupier of premises is liable for damage by fire caused by his negligence, or by the negligence of an independent contractor employed by him. He is liable under the rule in *Rylands v Fletcher*<sup>1</sup> where in the course of some non-natural use of his land he brings onto it things likely to catch fire, and keeps them there in such conditions that, if they ignited, the fire would be likely to spread to the claimant's land, and the things do ignite and the fire does so spread<sup>2</sup>. However, no claim may be brought against any person in whose house or other building, or on whose estate, any fire accidentally begins<sup>3</sup>.

1 As to the rule see *Rylands v Fletcher* (1868) LR 3 HL 330; PARA 594; and **NUISANCE** vol 78 (2010) PARA 148 et seq.

2 *Mason v Levy Auto Parts of England Ltd* [1967] 2 QB 530 at 542, [1967] 2 All ER 62 at 69-70 per MacKenna J. See also **FIRE SERVICES** vol 18(2) (Reissue) PARA 5.

3 See the Fires Prevention (Metropolis) Act 1774 s 86; and **FIRE SERVICES** vol 18(2) (Reissue) PARA 5. The exemption in respect of fires begun accidentally does not apply to fires started accidentally but continued and not extinguished through negligence or fires for which liability may be imposed upon the principle of *Rylands v Fletcher*: see *Musgrove v Pandelis* [1919] 2 KB 43.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(iii) Disturbance of Franchises and Incorporeal Hereditaments/596. Market.

### **(iii) Disturbance of Franchises and Incorporeal Hereditaments**

#### **596. Market.**

The owner of a market or fair has an action in tort against anyone who unjustifiably interferes with his franchise<sup>1</sup>. He may recover damages, and the continuance of the disturbance may be restrained by injunction<sup>2</sup>.

1 See **MARKETS, FAIRS AND STREET TRADING**.

2 See *Birmingham Corp'n v Perry Bar Stadium Ltd* [1972] 1 All ER 725; *Stoke-on-Trent City Council v W & I Wass Ltd* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA (proof of loss required); and **CIVIL PROCEDURE** vol 11 (2009) PARA 386.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(iii) Disturbance of Franchises and Incorporeal Hereditaments/597. Ferry.

### 597. Ferry.

The owner of the exclusive right of carrying for hire goods and passengers by means of boats has a claim in tort against anyone who unjustifiably disturbs his franchise ferry<sup>1</sup>.

1 See *Blissett v Hart* (1744) Willes 508; *Hammerton v Earl of Dysart* [1916] 1 AC 57, HL; and **WATER AND WATERWAYS** vol 101 (2009) PARA 848 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(3) TORTS TO LAND/(iii) Disturbance of Franchises and Incorporeal Hereditaments/598. Incorporeal hereditament.

### 598. Incorporeal hereditament.

The owner of an easement, profit à prendre or other incorporeal right can sue for the disturbance of his right<sup>1</sup>.

1 *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, CA, where it was held that if the plaintiff proved that effluent from the defendants' factory was being discharged into the river in which he had a right of fishery he could succeed in tort without proving damage. See further **EASEMENTS AND PROFITS A PRENDRE**.

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### (iv) Waste

#### 599. Waste.

If a person in possession of land under a limited interest causes damage to the reversionary interest in the land, the reversioner may sue him in tort for waste<sup>1</sup>.

1 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 431 et seq; **MINES, MINERALS AND QUARRIES** vol 31 (2003 Reissue) PARA 373; **SETTLEMENTS** vol 42 (Reissue) PARA 986 et seq.

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## **(4) WRONGFUL INTERFERENCE WITH GOODS**

### **600. In general.**

The law on wrongful interference encompasses the specific torts of conversion (also called trover)<sup>1</sup>, trespass to goods<sup>2</sup>, and negligence so far as it results in damage to goods or to an interest in goods<sup>3</sup>, and any other tort so far as it results in damage to goods or to an interest in goods<sup>4</sup>. The law here has been extensively modified by statute<sup>5</sup>, which abolishes the former tort of detinue but expands the scope of conversion, which now lies in every case in which detinue formerly lay before it was abolished<sup>6</sup>.

1 See PARA 601.

2 See PARA 602.

3 See PARA 603.

4 See PARA 603.

5 The Torts (Interference with Goods) Act 1977. Under the Act, 'goods' includes all chattels personal other than things in action and money: s 14(1).

6 See the Torts (Interference with Goods) Act 1977 s 2; and PARA 601.

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### **601. Conversion.**

It is a tort to convert another person's goods to one's own use. Conversion exists in three forms. To constitute the first form of conversion there must be a positive wrongful act of dealing with the goods in a manner inconsistent with the owner's rights<sup>1</sup>, and an intention<sup>2</sup> in so doing to deny the owner's rights or to assert a right inconsistent with them<sup>3</sup>. This inconsistency is the gist of the action. There need not be any knowledge on the part of the person sued that the goods belong to someone else<sup>4</sup>; nor need there be any positive intention to challenge the true owner's rights<sup>5</sup>. Liability in conversion is strict<sup>6</sup> and fraud or other dishonesty is not a necessary ingredient in the action<sup>7</sup>. Goods may be the subject of successive and independent conversions by persons dealing with them in such a manner and with such an intention<sup>8</sup>.

A second form of conversion is committed where goods are wrongfully detained by the defendant<sup>9</sup>. A wrongful detention gave rise to an action for detinue before detinue was abolished and now gives rise to an action in conversion<sup>10</sup>. The normal method of establishing a wrongful detention is to show that the claimant made a demand for the return of the goods and that the defendant refused after a reasonable time to comply with that demand<sup>11</sup>. In many cases this form of conversion will coincide with the first.

The third form of conversion lies for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor<sup>12</sup>. This enables conversion to be brought in a case



which would not have constituted conversion at common law, but which would have been detinue before detinue was abolished<sup>13</sup>.

Defences available in an action for conversion include that the goods have not been in the defendant's possession, that the defendant took them lawfully under a distress, or under an execution, or with the leave and licence of the claimant, or that he is entitled as against the claimant to a lien on the goods, or to retain the goods as mortgagee, or pledgee, or owner or part owner, or as a person with a right to their possession<sup>14</sup>.

The remedies<sup>15</sup> available for conversion are the retaking of goods<sup>16</sup>, proceedings for recovery<sup>17</sup>, damages<sup>18</sup>, and the disgorgement of gains by way of an action for money had and received<sup>19</sup>.

1 See **TORT** vol 45(2) (Reissue) PARAS 549-550.

2 A person may be presumed to intend the natural and probable consequences of his intentional act, and so the act of using another's goods in an illegal manner, which could result in their forfeiture, will constitute a conversion: see *Moorgate Mercantile Co Ltd v Finch and Read* [1962] 1 QB 701, [1962] 2 All ER 467, CA (using a car hired to third person for conveying uncustomed watches). Cf *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa Larga and Marble Islands* [1983] 2 Lloyd's Rep 171 at 181, CA, per Ackner LJ.

3 See **TORT** vol 45(2) (Reissue) PARA 548 et seq.

4 *Hollins v Fowler* (1875) LR 7 HL 757; *Motis Exports Ltd v Dampskibsselskabet AF1912* [1999] 1 All ER (Comm) 571 at 582, [1999] 1 Lloyd's Rep 837 at 844 per Rix J, citing the text.

5 *Lancashire and Yorkshire Rly Co v MacNicoll* (1918) 118 LT 596 at 598 per Atkin J; *Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd* [1939] AC 178 at 202, [1938] 4 All ER 389 at 404, HL, per Lord Porter; *Motis Exports Ltd v Dampskibsselskabet AF1912* [1999] 1 All ER (Comm) 571 at 582, [1999] 1 Lloyd's Rep 837 at 844 per Rix J, citing the text. See also *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 at 577, [1968] 1 WLR 956 at 970, CA, per Diplock LJ.

6 *Hollins v Fowler* (1875) LR 7 HL 757; *Lancashire and Yorkshire Rly Co v MacNicoll* (1918) 118 LT 596 at 598 per Atkin J, and at 597 per Lawrence J; *Marfani & Co Ltd v Midland Bank Ltd* [1968] 2 All ER 573 at 577, [1968] 1 WLR 956 at 970, CA, per Diplock LJ; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 at 685-686, [1998] 2 BCLC 659 at 670-671, CA, per Mummery LJ, and at 699, 686 per Hobhouse LJ; *Motis Exports Ltd v Dampskibsselskabet AF1912* [1999] 1 All ER (Comm) 571 at 580-583, [1999] 1 Lloyd's Rep 837 at 843-845 per Rix J. However, under the Torts (Interference with Goods) Act 1977 s 2(2) liability in conversion depends on a breach of duty by a bailee: see the text and notes 12-13.

7 *Beaman v ARTS Ltd* [1949] 1 KB 550, [1949] 1 All ER 465, CA (decided under limitation legislation).

8 *Morris v Robinson* (1824) 3 B & C 196 at 206 per Holroyd J; *Brinsmead v Harrison* (1871) LR 6 CP 584; *Brinsmead v Harrison* (1872) LR 7 CP 547, Ex Ch. As to the measure of damages in the case of successive conversions see **TORT** vol 45(2) (Reissue) PARA 636.

9 *Howard E Perry & Co Ltd v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375; *Finlayson v Taylor* (1983) 133 NLJ 720. Cf *Arthur v Anker* [1997] QB 564, [1996] 3 All ER 783, CA (immobilisation of vehicle by wheel clamp). See also **TORT** vol 45(2) (Reissue) PARA 542.

10 See **TORT** vol 45(2) (Reissue) PARAS 542-543. As to the abolition of detinue see the Torts (Interference with Goods) Act 1977 s 2(1); and PARA 600.

11 See *Howard E Perry & Co Ltd v British Railways Board* [1980] 2 All ER 579, [1980] 1 WLR 1375; and **TORT** vol 45(2) (Reissue) PARA 543.

12 See **BAILMENT** vol 3(1) (2005 Reissue) PARAS 15, 35, 46.

13 See the Torts (Interference with Goods) Act 1977 s 2(2).

14 See **TORT** vol 45(2) (Reissue) PARA 642 et seq.

15 As to the available forms of judicial relief and the effects of judgment see **TORT** vol 45(2) (Reissue) PARA 653 et seq.

16 See **TORT** vol 45(2) (Reissue) PARA 612.

- 17 See **TORT** vol 45(2) (Reissue) PARA 613.
- 18 See **TORT** vol 45(2) (Reissue) PARA 615 et seq.
- 19 See **TORT** vol 45(2) (Reissue) PARAS 640-641.

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## 602. Trespass to goods.

Trespass to goods is an unlawful disturbance of the possession<sup>1</sup> of goods by seizure<sup>2</sup> or removal, or by a direct act causing damage to the goods<sup>3</sup>.

The subject matter of trespass to goods must be a personal chattel which is the subject of lawful possession<sup>4</sup>.

Defences available in an action for trespass to goods include claim of right, jus tertii, and that the act complained of was done by the leave and licence of the claimant or in the exercise of a legal right<sup>5</sup>.

The remedies<sup>6</sup> available for trespass to goods are the retaking of goods and other forms of self-help<sup>7</sup>, damages<sup>8</sup>, and an order for the delivery of the goods<sup>9</sup>.

- 1 See **TORT** vol 45(2) (Reissue) PARAS 662-669.
- 2 As to trespass by illegal distress see **DISTRESS** vol 13 (2007 Reissue) PARAS 1076, 1094; and as to wrongful execution see **CIVIL PROCEDURE**.
- 3 See **TORT** vol 45(2) (Reissue) PARA 659. As to unintentional harm see **TORT** vol 45(2) (Reissue) PARA 660. As to the distinction between trespass and conversion see **TORT** vol 45(2) (Reissue) PARA 661.
- 4 See **TORT** vol 45(2) (Reissue) PARA 662 et seq.
- 5 See **TORT** vol 45(2) (Reissue) PARA 677 et seq.
- 6 As to the forms of judicial relief see **TORT** vol 45(2) (Reissue) PARA 672 et seq. As to the effect of settlement or judgment see **TORT** vol 45(2) (Reissue) PARA 684. As to compensation orders in criminal proceedings, and their effect on a subsequent award of damages in civil proceedings, see **TORT** vol 45(2) (Reissue) PARA 682 et seq.
- 7 See **TORT** vol 45(2) (Reissue) PARA 670.
- 8 See **TORT** vol 45(2) (Reissue) PARA 671.
- 9 See **TORT** vol 45(2) (Reissue) PARA 672.

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## 603. Negligence and other torts relating to goods.

The torts of wrongful interference with goods include negligence so far as it results in damage to goods or to an interest in goods<sup>1</sup>, and any other tort so far as it results in damage to goods or to an interest in goods<sup>2</sup>. The changes in substantive law and procedure effected by the Torts

(Interference with Goods) Act 1977 in relation to conversion and trespass to goods also apply to negligence and other torts in so far as they result in damage to goods or to an interest in goods<sup>3</sup>. Contributory negligence is not a defence to a claim for conversion or intentional trespass to goods, but may be relied upon in respect of the other wrongs falling within the statutory definition of 'wrongful interference'<sup>4</sup>.

1 See the Torts (Interference with Goods) Act 1977 s 1(c).

2 See the Torts (Interference with Goods) Act 1977 s 1(d). Such torts include rescue and pound breach (PARA 604), wrongful distress and replevin (PARA 605). Liability in private nuisance may also extend to chattels damaged on the land affected: *Hunter v Canary Wharf Ltd* [1997] AC 655 at 706, [1997] 2 All ER 426 at 452, HL, per Lord Hoffmann. The former tort of detinue, however, is abolished: see the Torts (Interference with Goods) Act 1977 s 2; and PARAS 600, 601.

3 See the Torts (Interference with Goods) Act 1977; and **TORT** vol 45(2) (Reissue) PARA 545.

4 See the Torts (Interference with Goods) Act 1977 s 11(1); and **TORT** vol 45(2) (Reissue) PARAS 639, 680. As to the meaning of 'wrongful interference' see the Torts (Interference with Goods) Act 1977 s 1; and **TORT** vol 45(2) (Reissue) PARA 545.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(4) WRONGFUL INTERFERENCE WITH GOODS/604. Rescue and pound-breach.

#### **604. Rescue and pound-breach.**

If after goods are seized under a distress and before impounding they are wrongfully taken out of the bailiff's possession, the distrainer may bring a claim of rescue (also known as rescous)<sup>1</sup>. If the goods are taken out of the pound he may bring a claim of pound-breach<sup>2</sup>. Persons aggrieved by such conduct also have a statutory cause of action for treble damages<sup>3</sup>.

1 See **DISTRESS** vol 13 (2007 Reissue) PARA 1069 et seq.

2 See **DISTRESS** vol 13 (2007 Reissue) PARA 1069 et seq.

3 See the Distress for Rent Act 1689 s 3; and **DISTRESS** vol 13 (2007 Reissue) PARA 1073.

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#### **605. Wrongful distress.**

A claim for damages lies for any wrongful distress, whether it is illegal, irregular or excessive<sup>1</sup>. Where the distress is wholly illegal, and not merely irregular or excessive, an action of replevin may lie to secure the redelivery of the chattels which have been illegally distrained<sup>2</sup>.

1 See **DISTRESS** vol 13 (2007 Reissue) PARA 1069 et seq.

2 See **DISTRESS** vol 13 (2007 Reissue) PARA 1081 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(4) WRONGFUL INTERFERENCE WITH GOODS/606. Damage to reversionary interests.

### 606. Damage to reversionary interests.

A person who has only a deferred right to the possession of a chattel<sup>1</sup> when an unauthorised act is committed upon it, and who lacks both possession and the immediate right to possess at that time, may nevertheless sue for damage to his reversionary interest<sup>2</sup>. For such a claim to be brought, the claimant must have a legal or common law interest in the chattel and not a mere equitable interest<sup>3</sup>, the unauthorised act must impair the claimant's interest in some permanent or enduring manner<sup>4</sup>, and the claimant must suffer his loss in his capacity as reversionary owner of the chattel, rather than in some other capacity, such as that of a person having the benefit of a contract for the use of the chattel<sup>5</sup>. The act which constitutes the wrong may be committed either deliberately or negligently and may cause either physical impairment of the chattel or a deprivation of the claimant's possession<sup>6</sup>.

The claim for damage to a reversionary interest is a claim for wrongful interference with goods and attracts the substantive and procedural provisions of the Torts (Interference with Goods) Act 1977, which govern this claim in substantially the same way as a claim for conversion<sup>7</sup>, trespass to goods<sup>8</sup> or negligence affecting goods<sup>9</sup>.

1 See **TORT** vol 45(2) (Reissue) PARA 559.

2 The claim for damage to a reversionary interest originated as a special action on the case to assist claimants who did not satisfy the requirement of the torts of conversion (see **TORT** vol 45(2) (Reissue) PARA 559 et seq) and trespass to goods (see **TORT** vol 45(2) (Reissue) PARA 662 et seq) that a claim for those torts lies only in favour of a person having possession or an immediate right of possession at the time of the wrong. It also supplements the requirement of the tort of negligence that the claimant must show either legal ownership or possessory title at the time of the wrong: see *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon* [1986] AC 785 at 809, [1986] 2 All ER 145 at 149, HL, per Lord Brandon of Oakbrook; *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep 128 at 138, CA, per Slade LJ.

3 *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 at 703, [1998] 2 BCLC 659 at 691, CA, per Hobhouse LJ, and at 687 and 673 per Mummery LJ. See **BAILMENT** vol 3(1) (2005 Reissue) PARA 86.

4 *Mears v London and South Western Rly Co* (1862) 11 CBNS 850; *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter, The Ibaraki Maru* [1986] AC 1, [1985] 2 All ER 935, PC.

5 *Candlewood Navigation Corp Ltd v Mitsui OSK Lines Ltd, The Mineral Transporter, The Ibaraki Maru* [1986] AC 1, [1985] 2 All ER 935, PC.

6 It may be preferable to regard the claim for damage to the reversionary interest as remedying, not a single composite tort, but three distinct torts, each of which respectively corresponds to one of the nominate torts of conversion, trespass to goods or negligence, but with the difference in each case that the plaintiff lacks the necessary immediate right of possession to sue for one of those nominate torts: see Tettenborn 'Reversionary Damage to Chattels' (1994) 53 CLJ 326.

7 As to conversion see PARA 601, and **TORT** vol 45(2) (Reissue) PARAS 548-658.

8 As to trespass to goods see PARA 602; and **TORT** vol 45(2) (Reissue) PARAS 659-684.

9 As to negligence affecting goods see PARA 603; and **TORT** vol 45(2) (Reissue) PARA 686.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(5) INTELLECTUAL PROPERTY TORTS/607. Infringement of copyright.

## (5) INTELLECTUAL PROPERTY TORTS

## 607. Infringement of copyright.

Infringements of copyright are actionable at the suit of either the owner or the exclusive licensee of the copyright (or both)<sup>1</sup>. The normal remedy is an injunction<sup>2</sup>, together with which the claimant may claim an account of profits<sup>3</sup> or an inquiry as to damages<sup>4</sup>.

1 Copyright, Designs and Patents Act 1988 ss 96(1), 101. As to rights of action for infringement of copyright generally see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 410 et seq.

2 As to the remedy of an injunction see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 412, 414, 416.

3 As to the remedy of an account of profits see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 419, 429.

4 As to damages see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 419, 429.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(5) INTELLECTUAL PROPERTY TORTS/608. Infringement of a patent.

## 608. Infringement of a patent.

The registered proprietor of a patent or his exclusive licensee may sue anyone who infringes the patent<sup>1</sup>. The remedies available are an injunction restraining further infringement, damages or, at the claimant's option, an account of profits, the delivery up or destruction of infringing articles, and a declaration that the patent is valid and has been infringed<sup>2</sup>.

1 As to infringement of patents generally see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 500 et seq. As to proceedings for infringement see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 521 et seq.

2 See the Patents Act 1977 s 61; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 523.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(5) INTELLECTUAL PROPERTY TORTS/609. Infringement of a trade mark.

## 609. Infringement of a trade mark.

Infringement of registered trade marks is actionable at the suit of the proprietor or licensee<sup>1</sup>. The remedies may be an injunction restraining further infringements, damages or an account of profits, and an order for the delivery up of the offending articles<sup>2</sup>.

1 See the Trade Marks Act 1994 ss 14, 30; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 416 et seq.

2 As to the infringement of registered trade marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 84 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(5) INTELLECTUAL PROPERTY TORTS/610. Passing off.

### 610. Passing off.

A person is liable in tort if, where another person's goods or services have acquired a goodwill in the market and are known by some distinguishing name, mark or other indicium, he makes a misrepresentation (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are goods or services of the other, and the other suffers damage as a result of the erroneous belief engendered by the misrepresentation<sup>1</sup>.

- 1 As to passing off generally see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 304 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(5) INTELLECTUAL PROPERTY TORTS/611. Breach of confidence.

### 611. Breach of confidence.

A person who has received information in confidence is not allowed to take improper advantage of it<sup>1</sup>. Liability for breach of confidence arises where material communicated to the defendant has the necessary quality of confidence, it was communicated or became known to him in circumstances entailing an obligation of confidence, and he makes unauthorised use of it<sup>2</sup>, unless there exists some just cause or excuse<sup>3</sup>. A successful claimant may be awarded an injunction<sup>4</sup>, and either damages for past and future losses<sup>5</sup> or an account of profits<sup>6</sup>.

Though the two causes of action overlap to some extent, liability for breach of confidence is to be distinguished from liability in the tort of unauthorised disclosure of personal information<sup>7</sup>.

- 1 *Seager v Copydex Ltd* [1967] 2 All ER 415 at 417, [1967] 1 WLR 923 at 931, CA, per Lord Denning MR; *A-G v Observer Ltd, A-G v Times Newspapers Ltd* [1990] 1 AC 109, sub nom *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, HL. The law's protection of confidence was originally a matter of equity but breach of confidence is now arguably to be regarded as a tort: see eg *McKennitt v Ash* [2006] EWCA Civ 1714 at [8], [2008] QB 73 at [8], [2007] 3 WLR 194 at [8] per Buxton LJ. Cf *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765 at 777-778, CA, per Evans LJ (denying derivation from tort and attributing jurisdiction to equity). As to confidentiality see generally **CONFIDENCE AND DATA PROTECTION**.

- 2 See **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARAS 402, 480 et seq.

- 3 See **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARAS 485 et seq.

- 4 See **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARAS 492-493.

- 5 See **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 496.

- 6 See **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 497. As to other remedies that may be available see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 491 et seq.

- 7 *OBG Ltd v Allan* [2007] UKHL 21 at [118], [2008] 1 AC 1 at [118], [2007] 4 All ER 545 at [118] per Lord Hoffmann, and at [255] per Lord Nicholls of Birkenhead. As to the tort of unauthorised disclosure of private information see PARA 561. As to the interrelationship of the two causes of action see also *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57, [2007] 2 All ER 139.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(6) ECONOMIC TORTS/(i) In general/612. The economic torts.

## **(6) ECONOMIC TORTS**

### **(i) In general**

#### **612. The economic torts.**

The economic torts is the collective name conventionally applied to the various causes of action arising in respect of intentional wrongdoing resulting in economic loss. The specific torts most normally referred to are the tort of procuring breach of contract<sup>1</sup>, the tort of causing loss by unlawful means<sup>2</sup>, the tort of intimidation<sup>3</sup> and the tort of conspiracy<sup>4</sup>.

1 See PARA 614 et seq.

2 See PARA 621.

3 See PARA 622.

4 See PARA 623 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(6) ECONOMIC TORTS/(i) In general/613. Trade dispute immunities.

#### **613. Trade dispute immunities.**

In practice, liability for the economic torts is significantly restricted by the statutory trade disputes immunities<sup>1</sup>. An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance<sup>2</sup>. An agreement or combination by two or more persons to do or procure the doing of any act in contemplation or furtherance of a trade dispute is not actionable in the tort of conspiracy if the act is one which, if done without any such agreement or combination, would not be actionable in tort<sup>3</sup>.

1 See **EMPLOYMENT** vol 41 (2009) PARA 1323 et seq.

2 Trade Union and Labour Relations (Consolidation) Act 1992 s 219(1).

3 Trade Union and Labour Relations (Consolidation) Act 1992 s 219(2). See also **EMPLOYMENT** vol 41 (2009) PARA 1327. As to trade disputes in general see **EMPLOYMENT** vol 41 (2009) PARA 1323 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/3. TORTS TO SPECIFIC INTERESTS/(6) ECONOMIC TORTS/(ii) Inducing Breach of Contract/614. In general.

### **(ii) Inducing Breach of Contract**

#### **614. In general.**

Where one person intentionally<sup>1</sup> induces or procures<sup>2</sup> a second person<sup>3</sup> to commit a breach of contract<sup>4</sup> against a third person, so that that third person suffers damage<sup>5</sup>, the first commits a wrong actionable at the suit of the third<sup>6</sup>, unless the inducement is justifiable<sup>7</sup>. Merely to prevent performance of a contract, or otherwise to interfere with its performance, is not actionable in the tort of procuring breach of contract, but may give rise to liability in the distinct tort of causing loss by unlawful means if the relevant requirements are satisfied<sup>8</sup>.

1 See PARA 619.

2 See PARA 617. The tort is sometimes referred to as the tort of procuring breach of contract: see eg *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 at 676-677, [1952] 2 All ER 361 at 368 per Evershed MR, and at 694 and 383 per Morris LJ; *Middlebrook Mushrooms Ltd v Transport and General Workers' Union* [1993] ICR 612 at 618, [1993] IRLR 232 at 234, CA, per Neill LJ; *JT Stratford & Son Ltd v Lindley* [1965] AC 269 at 333, [1964] 3 All ER 102 at 112, HL, per Lord Pearce, at 338 and 115 per Lord Upjohn, and at 342 and 118 per Lord Donovan; *Boxfoldia Ltd v National Graphical Association* (1982) [1988] ICR 752, [1988] IRLR 383.

3 The person induced cannot sue: *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 639-640, [1963] 1 All ER 716 at 731, CA, per Upjohn LJ. An employee acting bona fide within the scope of his authority and company directors acting as a board cannot be liable for inducing the employer or company to act in breach of contract with a third party: see *Said v Butt* [1920] 3 KB 497; *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 at 680-681, [1952] 2 All ER 361 at 369-370, CA, per Evershed MR; *G Scammell & Nephew Ltd v Hurley* [1929] 1 KB 419, CA. They may, however, be liable for conspiracy in an appropriate case: *De Jetley Marks v Greenwood* [1936] 1 All ER 863.

4 See PARA 615.

5 Actual damage is the gist of the claim: *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 at 369-370, CA, per Kennedy LJ; *Sefton v Tophams Ltd* [1965] Ch 1140 at 1206, [1965] 3 All ER 1 at 21, CA, per Russell LJ, and at 1196 and 15 per Harman LJ (revsd on different grounds [1967] 1 AC 50, [1966] 1 All ER 1039, HL); *Jones Bros (Hunstanton) Ltd v Stevens* [1955] 1 QB 275 at 281-283, [1954] 3 All ER 677 at 680-681, CA, per Lord Goddard CJ. Special damage in the narrow sense of the words is not required: see *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 at 370, CA, per Kennedy LJ; *British Industrial Plastics Ltd v Ferguson* [1938] 4 All ER 504 at 511, CA, per Slesser LJ.

6 *Lumley v Gye* (1853) 2 E & B 216; *Allen v Flood* [1898] AC 1 at 96, HL, per Lord Watson; *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 732 at 738, CA, per Collins MR; *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, HL; *OBG Ltd v Allan* [2007] UKHL 21 at [3], [2008] 1 AC 1 at [3], [2007] 4 All ER 545 at [3] et seq per Lord Hoffmann, and at [168] et seq per Lord Nicholls of Birkenhead.

The tort may be committed by inducing a second person to enter into a contract that is inconsistent with his obligations under an existing contract with a third person: see *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208; *British Motor Trade Association v Gray* 1951 SC 586, Ct of Sess; *Rickless v United Artists Corp* [1988] QB 40, [1987] 1 All ER 679, CA.

7 As to justification see PARA 618. As to the defence that the act was done in contemplation or furtherance of a trade dispute see PARA 613; and **EMPLOYMENT** vol 41 (2009) PARA 1327. As to the statutory exclusion of that defence see **EMPLOYMENT** vol 41 (2009) PARA 1329 et seq.

8 *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545, rejecting the approach of Lord Denning MR in *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106 at 138, [1969] 1 All ER 522 at 530, CA. As to causing loss by unlawful means see PARA 621.

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### 615. Requirement of a breach of contract.

The defendant must induce a breach of contract<sup>1</sup> or procure the violation of certain other private law obligations<sup>2</sup>. Procuring the breach of a secondary obligation arising by reason of the



non-performance of a primary obligation under a contract will suffice<sup>3</sup>. It is immaterial that the breach procured is not itself actionable in damages because the contract contains a force majeure clause protecting the party in breach or some other exemption from liability<sup>4</sup>. But it is not tortious merely to induce another person not to enter into a contract<sup>5</sup> or to induce another person lawfully to terminate a contract<sup>6</sup>. Inducing another person to suspend contractual relations with the claimant may be lawful or unlawful depending on whether or not this is allowed by the contract<sup>7</sup>. But no liability arises merely for preventing or otherwise interfering with another person's performance of his contractual obligations<sup>8</sup>.

1 There must be some evidence, even if slight, of the contract and its terms: *Middlebrook Mushrooms Ltd v Transport and General Workers' Union* [1993] ICR 612, [1993] IRLR 232, CA. See also *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762 at 779-780, [1968] 2 All ER 163 at 167-168, CA, per Lord Denning MR, and at 783-784 and 169-170 per Davies LJ; *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 751 at 757, [1984] 1 WLR 427 at 434, HL, per Lord Diplock; *Solihull Metropolitan Borough v National Union of Teachers* [1985] IRLR 211.

2 See eg *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, [1963] 1 All ER 716, CA (inducing breach of company director's fiduciary duty); *Prudential Assurance Co Ltd v Lorenz* (1971) 11 KIR 78 (inducing breach of duty of agent); *Bent's Brewery Co Ltd v Hogan* [1945] 2 All ER 570 (inducing breach of confidence). It is not a tort to induce a breach of trust: *Metall and Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 481, [1989] 3 All ER 14 at 57-58, CA, per Slade LJ. Nor is it tortious to procure a person's unfair dismissal from employment: *Wilson v Housing Corp'n* [1998] ICR 151, [1997] IRLR 346.

3 *Law Debenture Trust Corp'n Ltd v Ural Caspian Oil Ltd* [1995] Ch 152, [1995] 1 All ER 157, CA.

4 *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, [1969] 1 All ER 522, CA; *Merkur Island Shipping Corp'n v Laughton* [1983] 2 AC 570 at 608, [1983] 2 All ER 189 at 195, HL, per Lord Diplock; *Associated British Ports v Transport and General Workers' Union* [1989] 3 All ER 796 at 806, [1989] 1 WLR 939 at 952, CA, per Neill LJ, and at 816 and 963 per Stuart-Smith LJ (revsd on other grounds [1989] 3 All ER 822, [1989] 1 WLR 939 at 970, HL). See also *Sefton v Tophams Ltd* [1965] Ch 1140, [1965] 3 All ER 1, CA; revsd [1967] 1 AC 50, [1966] 1 All ER 1039, HL.

5 *Allen v Flood* [1898] AC 1, HL; *Midland Cold Storage Ltd v Steer* [1972] Ch 630, [1972] 3 All ER 941.

6 *White v Riley* [1921] 1 Ch 1; *McManus v Bowes* [1938] 1 KB 98 at 127, [1937] 3 All ER 227 at 239, CA, per Slessor LJ; *F Bowles & Sons Ltd v Lindley* [1965] 1 Lloyd's Rep 207; *Cutsforth v Mansfield Inns Ltd* [1986] 1 All ER 577, [1986] 1 WLR 558. In the employment context, whether or not a strike notice is properly categorised as notice of termination in accordance with the terms of the employment contract depends on the meaning and effect of the words used in the contract in which they were used: *Boxfoldia Ltd v National Graphical Association* (1982) [1988] IRLR 383 at 385 per Saville J. Cf *Barretts and Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3 at 8-9 per Henry J; *Morgan v Fry* [1968] 2 QB 710 at 731, [1968] 3 All ER 452 at 460, CA, per Davies LJ and at 738-739 and 465 per Russell LJ; *Simmons v Hoover Ltd* [1977] QB 284, [1977] 1 All ER 775, EAT. Depending on the intention of the parties, individual contracts of employment may incorporate collective agreements covering strikes: *Alexander v Standard Telephones and Cables Ltd (No 2)* [1991] IRLR 286; *Lee v GEC Plessey Telecommunications* [1993] IRLR 383; cf *National Coal Board v National Union of Mineworkers* [1986] ICR 736, [1986] IRLR 439. See also the Trade Union and Labour Relations (Consolidation) Act 1992 ss 179(1), 180.

7 See *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL (suspension of employee lawful); *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, [1968] 2 All ER 163, CA (suspension of supply a breach of contract).

8 *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545, disapproving dicta in *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 at 377, CA, per Lord Hewart CJ; *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106 at 138, [1969] 1 All ER 522 at 530, CA, per Lord Denning MR; *Merkur Island Shipping Corp'n v Laughton* [1983] 2 AC 570 at 608, [1983] 2 All ER 189 at 195, HL, per Lord Diplock. Where unlawful means are employed, liability may arise in the separate tort of causing loss by unlawful means: see PARA 621.

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## 616. Nature of contract.

The precise nature of the contract whose breach is induced is immaterial<sup>1</sup>, provided it is legally valid. Liability may arise in respect of the breach of negative as well as positive contractual obligations<sup>2</sup>, and the breach of an ongoing contractual obligation persisting after the termination of the relationship out of which it arose<sup>3</sup>. Conversely, liability cannot be established if the contract is unilateral and imposes no obligations on the person whose conduct was induced or procured by the defendant<sup>4</sup>. Nor can liability arise if the contract is void, whether because one of the parties lacks the capacity to contract<sup>5</sup>, or because it is a gaming contract<sup>6</sup>, or tainted with illegality<sup>7</sup>. Where a contract is not void but only voidable, this would appear to prevent liability for inducing its breach if the party induced was the one entitled to avoid it<sup>8</sup>, but arguably not if it was the claimant who enjoyed the right to avoid.

1 *Lumley v Gye* (1853) 2 E & B 216; *Bowen v Hall* (1881) 6 QBD 333, CA; *Temperton v Russell* [1893] 1 QB 715, CA; *Allen v Flood* [1898] AC 1 at 126, HL, per Lord Herschell; *Quinn v Leathem* [1901] AC 495, HL; *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 at 366, CA, per Kennedy LJ. The liability applies not just to contracts of service and contracts for services but also (eg) to contracts for the conveyance of land: see eg *Smith v Morrison* [1974] 1 All ER 957, [1974] 1 WLR 659 (no liability on the facts).

2 See eg *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208; *Rickless v United Artists Corpn* [1988] QB 40, [1987] 1 All ER 679, CA.

3 *Rickless v United Artists Corpn* [1988] QB 40 at 58, [1987] 1 All ER 679 at 698, CA, per Bingham LJ (citing the familiar example of a valid covenant against competition for 12 months after the termination of a person's employment).

4 *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 751 at 757, [1984] 1 WLR 427 at 434, HL, per Lord Diplock.

5 *De Francesco v Barnum* (1890) 45 ChD 430.

6 *Joe Lee Ltd v Dalmeny* [1927] 1 Ch 300; *Said v Butt* [1920] 3 KB 497; *Associated British Ports v Transport and General Workers' Union* [1989] 3 All ER 796 at 816, [1989] 1 WLR 939 at 964, CA, per Stuart-Smith LJ (revsd on other grounds [1989] 3 All ER 822, [1989] 1 WLR 939 at 970, HL).

7 *British Motor Trade Association v Gray* 1951 SC 586, Ct of Sess (covenants in restraint of trade); *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142, [1973] 3 All ER 1057, DC (contravention of EU competition law).

8 *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2812, [2007] 1 All ER 542. The contrary approach had previously been adopted in *Keane v Boycott* (1795) 2 Hy BI 511, which was not cited to the court in *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2812, [2007] 1 All ER 542. The proposed distinction between void and voidable contracts was doubted by Ferris J in *Essex Electric (Pte) Ltd v IPC Computers (UK) Ltd* [1991] FSR 690 at 709-710.

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## 617. Inducement.

There is an inducement if the breaking of the contract is fairly attributable to influence by way of pressure, persuasion or procuration brought to bear on the mind of the contract breaker by the defendant<sup>1</sup>. It is immaterial whether the inducement is direct or indirect<sup>2</sup>, or whether it is by way of threat<sup>3</sup> or positive incentive<sup>4</sup>. The fact that an inducement to break a contract is couched as an irresistible embargo rather than in terms of seduction does not make it any the less an inducement<sup>5</sup>. There is no significant distinction to be made between advice and persuasion<sup>6</sup>, nor need there be direct communication between the defendant and the contract breaker<sup>7</sup>. Indeed merely tacit encouragement may suffice<sup>8</sup>.

- 1 *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 at 686, [1952] 2 All ER 361 at 373, CA, per Sir Raymond Evershed MR, and at 693 and 378 per Jenkins LJ; *Camellia Tanker Ltd SA v International Transport Workers Federation* [1976] ICR 274, [1976] IRLR 190, CA.
- 2 *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545 at [34] et seq per Lord Hoffmann.
- 3 See eg *Emerald Construction Co Ltd v Lowthian* [1966] 1 All ER 1013, [1966] 1 WLR 691, CA; *Patrick Stevedores Operation Pty Ltd v International Transport Workers' Federation* [1998] 2 Lloyd's Rep 523; *Dimbleby & Sons Ltd v National Union of Journalists* [1984] 1 All ER 751, [1984] 1 WLR 427, HL.
- 4 See eg *South Wales Miners' Federation v Glamorgan Coal Co* [1905] AC 239, HL (offer of improved conditions of employment).
- 5 *JT Stratford & Son v Lindley* [1965] AC 269 at 333, [1964] 3 All ER 102 at 112, HL, per Lord Pearce.
- 6 *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106 at 147, [1969] 1 All ER 522 at 537-538, CA, per Winn LJ; *Camden Nominees Ltd v Forcey* [1940] Ch 352 at 366, sub nom *Camden Nominees Ltd v Slack* [1940] 2 All ER 1 at 11 per Simonds J; but cf *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 at 686, [1952] 2 All ER 361 at 373, CA, per Sir Raymond Evershed MR.
- 7 See eg *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, [1968] 2 All ER 163, CA (persuasion relayed via third party).
- 8 See eg *Union Traffic Ltd v Transport and General Workers' Union* [1989] ICR 98 at 106, CA, per Bingham LJ (picketing); *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310 (union providing strike pay to its members).

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### **618. When interference is justifiable.**

A person inducing a breach of contract commits no actionable wrong if his conduct is justified<sup>1</sup>. However, the limits of this defence have not been precisely defined, and regard must be had to the individual circumstances of each case<sup>2</sup>. Examples of situations in which justification may be proved are where the person inducing acts in accordance with a duty<sup>3</sup>, or where the contract broken is one which cannot be carried out without infringing his contractual rights<sup>4</sup>. But A is not justified in procuring B to breach his contract with C merely as retaliation for C's breach of his contract with A<sup>5</sup>.

It is not a sufficient justification that the person who procured or encouraged the breach did not, in so doing, act maliciously, and had no desire to injure the claimant<sup>6</sup>. Nor is it sufficient that he honestly believed at the time when he procured or encouraged the breach that it was for the common interest of himself and the contract breaker that the contract breaker should breach the contract<sup>7</sup>, while the fact that the person procuring or encouraging the breach owes the contract breaker a duty to advise him as to his position and dealings as regards the other contracting party does not excuse him from liability if the object of the advice is to procure or encourage what is illegal<sup>8</sup>.

The inducing of a breach of contract which may lead to immorality has been held to be justified<sup>9</sup>, but it seems that the defence will arise only if the facts are very strong<sup>10</sup>.

1 See eg *Quinn v Leathem* [1901] AC 495 at 510, HL, per Lord Macnaghten; *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, HL; *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310, CA; *Camden Nominees Ltd v Forcey* [1940] Ch 352 at 366, sub nom *Camden Nominees Ltd v Slack* [1940] 2 All ER 1 at 11 per Simonds J; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442-443,

[1942] 1 All ER 142 at 148, HL, per Viscount Simon LC, and at 495-496 and 175 per Lord Porter; *Edwin Hill & Partners (a firm) v First National Finance Corp plc* [1988] 3 All ER 801, [1989] 1 WLR 225, CA. As to justification where the defendant procures the breach of contract by unlawful means see PARA 621.

2 *Glamorgan Coal Co Ltd v South Wales Miners' Federation* [1903] 2 KB 545 at 573-574, CA, per Romer LJ (affd *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, HL); *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 495-496, [1942] 1 All ER 142 at 175, HL, per Lord Porter.

3 *Brimelow v Casson* [1924] 1 Ch 302, where there was a moral duty to the defendant's members and possibly to the public. See also *De Jetley Marks v Lord Greenwood* [1936] 1 All ER 863 at 873 per Porter J; *Pritchard v Briggs* [1980] Ch 338 at 415-417, [1980] 1 All ER 294 at 326-328, CA, per Goff LJ. Cf *Timeplan Education Group v National Union of Teachers* [1997] IRLR 457 at [31], CA, per Peter Gibson LJ.

4 *Edwin Hill & Partners (a firm) v First National Finance Corp plc* [1988] 3 All ER 801, [1989] 1 WLR 225, CA; *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch), [2007] Ch 197, [2006] 3 All ER 1029 (revsd on other grounds [2007] EWCA Civ 1303, [2008] Ch 244, [2008] 2 WLR 904). See also *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310 at 337, CA, per Buckley LJ; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 495-496, [1942] 1 All ER 142 at 175, HL, per Lord Porter.

5 *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310 at 337, 341, CA.

6 *Read v Friendly Society of Operative Stonemasons of England Ireland and Wales* [1902] 2 KB 88 at 96 per Darling J; *Glamorgan Coal Co v South Wales Miners' Federation* [1903] 2 KB 545 at 574, CA, per Romer LJ (affd [1905] AC 239, HL); *Greig v Insole, World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449 at 485, [1978] 1 WLR 302 at 332 per Slade J; *Edwin Hill & Partners v First National Finance Corp plc* [1988] 3 All ER 801, [1989] 1 WLR 225.

7 *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, HL.

8 *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239, HL.

9 *Brimelow v Casson* [1924] 1 Ch 302; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 495-496, [1942] 1 All ER 142 at 175, HL, per Lord Porter.

10 See *Camden Nominees Ltd v Forcey* [1940] Ch 352 at 366, sub nom *Camden Nominees Ltd v Slack* [1940] 2 All ER 1 at 11 per Simonds J; *Pritchard v Briggs* [1980] Ch 338 at 416, [1980] 1 All ER 294 at 328, CA, per Goff LJ.

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### 619. Intention to procure breach of contract.

It must be shown that the defendant knew of the existence of the contract and intended to procure its breach<sup>1</sup>, but malice in the sense of spite or ill-will is not required<sup>2</sup>; nor is it necessary to show that the defendant intended to cause the claimant harm as a result of the breach<sup>3</sup>. The defendant's actual knowledge of the contractual obligation in question is required: constructive knowledge will not do<sup>4</sup>. The defendant need not have exact knowledge of all the terms of the contract<sup>5</sup>, but, even if he knows a contract exists, he may escape liability if mistaken as to the scope of the contractual obligation and unaware therefore that he is procuring its breach<sup>6</sup>. It is not enough that the defendant knows he is procuring an act which, as a matter of law or construction of the contract, is a breach, nor that he ought reasonably to realise that it will have this effect: he must actually realise that it will have such effect<sup>7</sup>. Liability does not attach to a person who acts negligently<sup>8</sup> or in a muddleheaded manner<sup>9</sup>. However, it is enough to establish the tort that the defendant consciously turned a blind eye to the existence of the contract and induced the breach recklessly, indifferent whether it was a breach or not<sup>10</sup>.

1 *White v Riley* [1921] 1 Ch 1 at 16, CA, per Lord Sterndale MR; *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 at 697, [1952] 2 All ER 361 at 379, CA, per Jenkins LJ; *Rookes v Barnard* [1964] AC 1129 at 1212, [1964] 1 All ER 367 at 401, HL, per Lord Devlin; *Emerald Construction Co Ltd v Lowthian* [1966] 1 All ER 1013, [1966] 1 WLR 691, CA; *OBG Ltd v Allan* [2007] UKHL 21 at [39], [2008] 1 AC 1 at [39], [2007] 4 All ER 545 at [39] et seq per Lord Hoffmann, and at [191] et seq per Lord Nicholls of Birkenhead; *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244, [2008] 2 WLR 904.

2 *Allen v Flood* [1898] AC 1 at 95, HL, per Lord Watson, at 123 per Lord Herschell and at 154 per Lord Macnaghten; *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 at 246, HL, per Lord Macnaghten; *OBG Ltd v Allan* [2007] UKHL 21 at [8], [2008] 1 AC 1 at [8], [2007] 4 All ER 545 at [8] per Lord Hoffmann.

3 *OBG Ltd v Allan* [2007] UKHL 21 at [8], [2008] 1 AC 1 at [8], [2007] 4 All ER 545 at [8] per Lord Hoffmann, and at [192] per Lord Nicholls of Birkenhead. In this respect, the tort of inducing a breach of contract is to be distinguished from the tort of causing loss by unlawful means: see PARA 621.

4 *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548 at 572, [1979] 2 All ER 853 at 871 per Browne-Wilkinson J; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545. Knowledge of past contracts is not the same as knowledge of continuing contractual relations: see *TimePlan Education Group Ltd v National Union of Teachers* [1997] IRLR 457, CA.

5 *JT Stratford & Son Ltd v Lindley* [1965] AC 269, [1964] 3 All ER 102, HL; *Emerald Construction Co Ltd v Lowthian* [1966] 1 All ER 1013, [1966] 1 WLR 691, CA; *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, [1968] 2 All ER 163, CA; *Greig v Insole*, *World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302.

6 *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA. See also *White v Riley* [1921] 1 Ch 1 at 26, CA, per Warrington LJ.

7 *OBG Ltd v Allan* [2007] UKHL 21 at [39], [2008] 1 AC 1 at [39], [2007] 4 All ER 545 at [39] per Lord Hoffmann. It is immaterial that the defendant's belief that the outcome he seeks will involve no breach of contract is mistaken in law: *OBG Ltd v Allan* [2007] UKHL 21 at [202], [2008] 1 AC 1 at [202], [2007] 4 All ER 545 at [202] per Lord Nicholls of Birkenhead. Earlier decisions taking a contrary view (see eg *Greig v Insole*, *World Series Cricket Pty Ltd v Insole* [1978] 3 All ER 449 at 494, [1978] 1 WLR 302 at 344 per Slade J; *Pritchard v Briggs* [1980] Ch 338 at 414-415, [1980] 1 All ER 294 at 328, CA, per Goff LJ; *Solihull Metropolitan Borough v National Union of Teachers* [1985] IRLR 211 at 213 per Warner J) must be considered impliedly disapproved. See also *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244, [2008] 2 WLR 904.

8 *OBG Ltd v Allan* [2007] UKHL 21 at [41], [2008] 1 AC 1 at [41], [2007] 4 All ER 545 at [41] per Lord Hoffmann, and at [191] per Lord Nicholls of Birkenhead.

9 *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479; *Jones Bros (Hunstanton) Ltd v Stevens* [1955] 1 QB 275 at 280, [1954] 3 All ER 677 at 681-682, per Lord Goddard CJ; *OBG Ltd v Allan* [2007] UKHL 21 at [202], [2008] 1 AC 1 at [202], [2007] 4 All ER 545 at [202] per Lord Nicholls of Birkenhead.

10 *Emerald Construction Co Ltd v Lowthian* [1966] 1 All ER 1013 at 1017, [1966] 1 WLR 691 at 701, CA, per Lord Denning MR; *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762 at 781, [1968] 2 All ER 163 at 168, CA, per Lord Denning MR, and at 784 and 170 per Davies LJ; *Boxfoldia Ltd v National Graphical Association* (1982) [1988] IRLR 383 at 386 per Saville J; *OBG Ltd v Allan* [2007] UKHL 21 at [41], [2008] 1 AC 1 at [41], [2007] 4 All ER 545 at [41] per Lord Hoffmann.

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## 620. Remedies.

A successful claimant is *prima facie* entitled to damages for loss suffered as a result of the tort and an injunction to prevent the continuation or repetition of the tortious conduct<sup>1</sup>. Damages for inducing breach of contract are not necessarily calculated on the same basis as that used to calculate the damages for the actual breach, and may exceed the damages recoverable in an action for breach of contract<sup>2</sup>. The award of damages for inducing breach of contract is 'at

large<sup>13</sup>. The heads of recoverable damage include out-of-pocket expenditure<sup>4</sup>, loss of profit<sup>5</sup> and, in an appropriate case, non-pecuniary loss<sup>6</sup>.

As it is an essential part of the cause of action that the claimant should have sustained some loss<sup>7</sup>, he cannot maintain a claim against the person inducing the breach of contract where he has already been indemnified for his loss by the contract breaker<sup>8</sup>.

1 As to injunctions against inducing breach of contract see eg *Lumley v Gye* (1853) 2 E & B 216; *JT Stratford & Son Ltd v Lindley* [1965] AC 269, [1964] 3 All ER 102, HL; *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, [1969] 1 All ER 522, CA. The court has power to grant a mandatory injunction where there is interference which is deliberate and direct, and where damages would be an inadequate remedy: see *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142, [1973] 3 All ER 1057, DC. The claimant may in the same action join the contract breaker as a co-defendant and claim, as against him, an injunction only: see eg *De Francesco v Barnum* (1890) 45 ChD 430.

2 *Lumley v Gye* (1853) 2 E & B 216 at 230 per Crompton J, and at 233-234 per Erle J. As the tort is one of intention it appears that all direct losses, whether foreseeable or not, may be recovered: see *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 279-280, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 at 789, HL, per Lord Steyn. See also **DAMAGES** vol 12(1) (Reissue) PARA 853.

Where the defendant has induced the claimant's employee to leave his employment in breach of contract and work for the defendant instead, the claimant may waive the tort and sue in restitution for the value of the employee's services: *Lightly v Clouston* (1808) 1 Taunt 112; *Foster v Stewart* (1814) 3 M & S 191.

3 *Exchange Telegraph Co Ltd v Gregory & Co Ltd* [1896] 1 QB 147 at 153, CA, per Lord Esher MR; *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 593, CA.

4 See eg *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208 (expense of detecting the tort); *Boxfoldia Ltd v National Graphical Association* (1982) [1988] ICR 752, [1988] IRLR 383 (redundancy payments to non-striking employees who had to be laid off).

5 See eg *Exchange Telegraph Co Ltd v Gregory & Co Ltd* [1896] 1 QB 147, CA; *Goldson v Goldman* [1914] 2 Ch 603 (affd [1915] 1 Ch 292, CA). Damages have also been awarded for harm to commercial reputation: *GWK v Dunlop Rubber Co* (1926) 42 TLR 376 (on appeal at (1926) 42 TLR 593, CA).

6 See *Pratt v British Medical Association* [1919] 1 KB 244; but cf *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA.

7 *Exchange Telegraph Co Ltd v Gregory & Co Ltd* [1896] 1 QB 147, CA; *Goldson v Goldman* [1914] 2 Ch 603 (affd [1915] 1 Ch 292, CA); *Bents Brewery Co Ltd v Hogan* [1945] 2 All ER 570; *Jones Bros (Hunstanton) Ltd v Stevens* [1955] 1 QB 275, [1954] 3 All ER 677, CA. See also PARA 614 note 5.

8 *Bird v Randall* (1762) 3 Burr 1345.

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### **(iii) Unlawful Interference with Economic Interests**

#### **A. IN GENERAL**

##### **621. Causing loss by unlawful means.**

English law does not afford a claim in tort to every person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another<sup>1</sup>, but it is a tort intentionally to cause another person loss by unlawful means<sup>2</sup>. Liability for the use of unlawful means does not depend upon the existence of contractual relations: it is sufficient that the

intended consequence of the wrongful act is damage in any form, including damage to economic expectations<sup>3</sup>. Means employed to injure the claimant via the agency of a third party are unlawful in the present context only if they are actionable by the third party, or would have been so actionable had the third party suffered loss, and not if they merely involve infringement of a penal or regulatory statute not intended to be actionable in private law<sup>4</sup>. A breach of contract constitutes unlawful means<sup>5</sup>, so where A induces B to breach his contract with C, preventing C from performing his contract with D, D may have a claim against A for causing him loss by unlawful means<sup>6</sup>.

The defendant may be liable even though it is not his purpose to cause loss to the claimant, and he does so only to further his own interests, but he is not liable for loss that is neither a desired end nor a means of attaining a desired end but merely a foreseeable consequence of his actions<sup>7</sup>.

Because the defendant has *ex hypothesi* committed an unlawful act, it has been doubted whether a defence of justification is available<sup>8</sup>, but there is some authority to suggest that the defence may arise in exceptional cases<sup>9</sup>.

1 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, [1981] 2 All ER 456, HL; not following *Beautesert Shire Council v Smith* (1966) 120 CLR 145, Aust HC.

2 *OBG Ltd v Allan* [2007] UKHL 21 at [6], [2008] 1 AC 1 at [6], [2007] 4 All ER 545 at [6] et seq and [45] et seq per Lord Hoffmann, [141] et seq per Lord Nicholls of Birkenhead. The tort may be traced back to *Garret v Taylor* (1620) Cro Jac 567 and *Tarleton v M'Gawley* (1790) 1 Peake NPC 270, both cases of intimidation. As to intimidation see PARA 622. See also *Allen v Flood* [1898] AC 1 at 96, HL, per Lord Watson; *Quinn v Leathem* [1901] AC 495 at 534-535, HL, per Lord Lindley; *JT Stratford & Son Ltd v Lindley* [1965] AC 269 at 324, [1964] 3 All ER 102 at 106-107, HL, per Lord Reid, and at 328-329 and 109-110 per Viscount Radcliffe; *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at 228-229, [1982] 1 All ER 1042 at 1052-53, HL, per Lord Diplock; *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570 at 606-610, [1983] 2 All ER 189 at 194-197, HL, per Lord Diplock. Mere facilitation of harm or loss is not enough: *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013, [1988] 2 All ER 484, HL.

3 *OBG Ltd v Allan* [2007] UKHL 21 at [8], [2008] 1 AC 1 at [8], [2007] 4 All ER 545 at [8] per Lord Hoffmann. However, at least in a three-party case, the defendant must interfere with the third party's freedom to deal with the claimant: *OBG Ltd v Allan* [2007] UKHL 21 at [51], [2008] 1 AC 1 at [51], [2007] 4 All ER 545 at [51] per Lord Hoffmann, at [270] per Lord Walker of Gestingthorpe and at [320] per Lord Brown of Eaton-under-Heywood. See also *RCA Corp v Pollard* [1983] Ch 135, [1982] 3 All ER 771, CA; *ISSAC Oren v Red Box Toy Factory Ltd* [1999] FSR 785.

4 *OBG Ltd v Allan* [2007] UKHL 21 at [49], [2008] 1 AC 1 at [49], [2007] 4 All ER 545 at [49] et seq per Lord Hoffmann, at [270] per Lord Walker of Gestingthorpe, at [302] per Baroness Hale of Richmond and at [320] per Lord Brown of Eaton-under-Heywood. Cf *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, [1981] 2 All ER 456, HL. It should be noted that liability for causing loss by unlawful means is a primary liability distinct from any liability arising in the tort of breach of statutory duty. As to breach of statutory duty see PARA 495 et seq.

For examples of unlawful means see *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335, CA (deceit); *Prudential Assurance Co Ltd v Lorenz* (1971) 11 KIR 78 (breach of agency); *Bents Brewery Co Ltd v Hogan* [1945] 2 All ER 570; *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 2 QB 606, [1963] 1 All ER 716, CA (breach of director's duty); *Indata Equipment Supplies Ltd v ACL* [1998] 1 BCLC 412, [1998] FSR 248, CA (breach of confidence). Dishonest breach of trust may also constitute illegal means: *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [1995] 3 All ER 97, PC.

Crimes not giving rise to tortious liability do not constitute unlawful means: see *Hargreaves v Bretherton* [1959] 1 QB 45, [1958] 3 All ER 122 (perjury); *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513, CA (criminal contempt of court). Civil contempt of court is arguably to be treated differently: *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA (aiding breach of injunction).

Restraint of trade cannot be relied upon as unlawful means: *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25, HL; *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139.

5 *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL.

6 See eg *JT Stratford & Son Ltd v Lindley* [1965] AC 269, [1964] 3 All ER 102, HL; *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, [1983] 2 All ER 189, HL.

7 *OBG Ltd v Allan* [2007] UKHL 21 at [62], [2008] 1 AC 1 at [62], [2007] 4 All ER 545 at [62] per Lord Hoffmann, and at [164] et seq per Lord Nicholls of Birkenhead.

8 *Mogul Steamship Co v McGregor, Dow & Co* (1889) 23 QBD 598 at 614, CA, per Bowen LJ (cited in *National Phonograph Co v Edison-Bell Consolidated Phonograph Co* [1908] 1 Ch 335 at 369, CA, per Kennedy LJ); *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 88 at 738, per Collins MR.

9 *Rookes v Barnard* [1964] AC 1129 at 1209, [1964] 1 All ER 367 at 399-400, HL, per Lord Devlin; *Morgan v Fry* [1968] 2 QB 710 at 729, [1968] 3 All ER 452 at 459, CA, per Lord Denning MR; *Cory Lighterage Ltd v Transport and General Workers' Union* [1973] ICR 339 at 356-357, CA, per Lord Denning MR; and see PARA 622.

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## **B. INTIMIDATION**

### **622. In general.**

It is a tort to coerce another person to act in such a way as to cause loss to himself<sup>1</sup> or to a third party by the threat of unlawful conduct<sup>2</sup>. The liability so arising is a particular instance of liability for intentionally causing loss by unlawful means<sup>3</sup>. The elements of the tort of intimidation are the communication of a threat<sup>4</sup> to do something unlawful<sup>5</sup>, the submission to that threat by the person to whom it is addressed<sup>6</sup>, and the intention of injuring the claimant thereby<sup>7</sup>.

The threat must be more than mere 'idle abuse'<sup>8</sup>. A coercive element is necessary<sup>9</sup>; but the mere fact that the person addressed would have acted differently if he had not been so addressed is not sufficient to show that he was acting under coercion<sup>10</sup>. It has long been accepted that injury caused by the threat of personal violence is actionable<sup>11</sup>; likewise a threat of violence to property<sup>12</sup>. A threat to breach one's contractual obligations also suffices<sup>13</sup>.

The tort is actionable only on proof that the claimant has suffered damage<sup>14</sup>. In an appropriate case, it is possible that a defence of justification may arise<sup>15</sup>, though this is yet to be authoritatively decided.

1 As to two-party intimidation see *Rookes v Barnard* [1964] AC 1129 at 1205, [1964] 1 All ER 367 at 397, HL, per Lord Devlin (example of trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant); *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181, [1986] IRLR 337, CA (intimidation directed at employee who refused to participate in strike action). See also *Godwin v Uzoigwe* [1993] Fam Law 65, CA (couple who made girl work long hours without pay and social intercourse liable in tort for intimidation).

2 *Garret v Taylor* (1620) Cro Jac 567; *Tarleton v M'Gawley* (1790) 1 Peake NPC 270; *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL.

3 *OBG Ltd v Allan* [2007] UKHL 21 at [6], [2008] 1 AC 1 at [6], [2007] 4 All ER 545 at [6] et seq per Lord Hoffmann.

4 As to the meaning of 'threat' see *Hodges v Webb* [1920] 2 Ch 70 at 89 per Peterson J.

5 The threat must be to do something which would be actionable by the person to whom it is addressed if carried out: see *OBG Ltd v Allan* [2007] UKHL 21 at [49], [2008] 1 AC 1 at [49], [2007] 4 All ER 545 at [49] per Lord Hoffmann; and PARA 621. An intimation that a person is going to do what he lawfully may do will not suffice: *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40 at 87, CA, per Atkin LJ.

6 *Rookes v Barnard* [1964] AC 1129 at 1208, [1964] 1 All ER 367 at 399, HL, per Lord Devlin.

7 As to intention see PARA 621.



8 *News Group Newspapers Ltd v Society of Graphical and Allied Trades '82 (No 2)* [1987] ICR 181 at 204, CA, per Stuart Smith LJ.

9 *Rookes v Barnard* [1964] AC 1129 at 1207, [1964] 1 All ER 367 at 398, HL, per Lord Devlin.

10 *Hodges v Webb* [1920] 2 Ch 70 at 86 per Peterson J. As to the distinction between a threat and a mere warning of untoward consequences see *White v Riley* [1921] 1 Ch 1, CA; *Huntley v Thornton* [1957] 1 All ER 234 at 251, [1957] 1 WLR 321 at 344 per Harman J. In the case of a threatening course of conduct, an alternative cause of action may arise under the Protection from Harassment Act 1997 s 3(1): see PARA 557.

11 See eg *Keeble v Hickeringill* (1706) Holt KB 14 at 19 per Holt CJ; *Garret v Taylor* (1620) Cro Jac 567; *Tarleton v M'Gawley* (1790) 1 Peake NPC 270; *Rookes v Barnard* [1964] AC 1129 at 1208, [1964] 1 All ER 367 at 399, HL, per Lord Devlin; *Messenger Group Newspapers v NGA* [1984] IRLR 397 (violent picketing).

12 *Allen v Flood* [1898] AC 1 at 128, HL, per Lord Herschell.

13 *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. Whether a threat of vexatious litigation (apparently accepted as an alternative basis of the decision in *Garret v Taylor* (1620) Cro Jac 567) suffices may, however, be doubted in view of the general requirement of actionability.

14 As to damage see PARA 624 note 5.

15 See *Rookes v Barnard* [1964] AC 1129 at 1209, [1964] 1 All ER 367 at 399-400, HL, per Lord Devlin; *Morgan v Fry* [1968] 2 QB 710 at 729, [1968] 3 All ER 452 at 459, CA, per Lord Denning MR; *Cory Lighterage Ltd v Transport and General Workers' Union* [1973] ICR 339 at 356-357, CA, per Lord Denning MR. As to justification for causing loss by unlawful means generally see PARA 621.

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## (iv) Conspiracy

### 623. In general.

A tortious conspiracy is an unlawful combination of two or more people, intended to cause and in fact causing injury to the claimant<sup>1</sup>. The tort takes two forms: conspiracy to cause loss by the use of independently unlawful means<sup>2</sup>, and conspiracy to injure by lawful means<sup>3</sup>. The latter constitutes an exception to the normal requirement in the economic torts of independently unlawful means, and for that reason liability is restricted by a requirement of a predominant purpose to injure which is not a requirement of conspiracy to use unlawful means<sup>4</sup>.

If a tort is committed by several persons acting in concert, and damage is caused, the prior agreement may add nothing to the tort, and has been said to merge in it<sup>5</sup>, for the parties will be joint tortfeasors<sup>6</sup>. Yet there may be good reasons for alleging a conspiracy and not (or not only) the underlying torts, for example, if the torts are committed in several different jurisdictions<sup>7</sup>. It is also necessary to consider conspiracy as a separate tort where the act would not have been tortious if done by one individual.

1 There is also the crime of conspiracy, the essence of which lies in the agreement, so that in order to establish the offence it is not necessary, as it would be to establish the tort, to prove damage: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 67 et seq. In a claim for damages for conspiracy, it is no objection to the making of an order for an affidavit of documents by the defendant that the documents may tend to incriminate him: *National Association of Operative Plasterers v Smithies* [1906] AC 434, HL. See also **CIVIL PROCEDURE**. As regards combinations of employees and criminal conspiracy see **EMPLOYMENT** vol 41 (2009) PARA 1328.

For a summary of historical sources see *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1888) 21 QBD 544 at 550 per Lord Coleridge CJ; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 443-444, [1942] 1 All ER 142 at 148, HL, per Viscount Simon LC.

2 See PARA 625.

3 See PARA 626.

4 See *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 462, [1942] 1 All ER 142 at 158, per Lord Wright; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 189-189, [1981] 2 All ER 456 at 464, HL, per Lord Diplock; *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19 at [66], [2008] 1 AC 1174 at [66], [2008] 2 All ER 413 at [66] per Lord Walker of Gestingthorpe; cf at [56] per Lord Scott of Foscote (the difference between the two forms of conspiracy is not anomalous).

5 *Ward v Lewis* [1955] 1 All ER 55, [1955] 1 WLR 9, CA. See also *Sorrell v Smith* [1925] AC 700 at 716, HL, per Lord Dunedin ('surplusage').

6 See *Pratt v British Medical Association* [1919] 1 KB 244 at 254, where it was said that all who have aided, counselled, directed or joined in the tort are joint tortfeasors.

7 *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at 316, 319, CA, per Nourse LJ.

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## 624. Essential ingredients.

In order to make out a case of conspiracy the claimant must establish<sup>1</sup>: (1) an agreement between two or more persons<sup>2</sup>; (2) either, where the means are lawful, an agreement the real and predominant purpose of which is to injure the claimant<sup>3</sup> or, where the means are unlawful, an agreement an intended consequence of which is to injure the claimant<sup>4</sup>; and (3) that acts done in execution of that agreement resulted in damage to the claimant<sup>5</sup>.

1 See the classic statement of the elements of conspiracy in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 440, [1942] 1 All ER 142 at 147, HL, per Viscount Simon LC (followed in *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* [1958] 3 All ER 220 at 222, [1958] 1 WLR 1057 at 1060, CA, per Hodson LJ); and see also *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 188, [1981] 2 All ER 456 at 463, HL, per Lord Diplock.

2 Husband and wife may be jointly liable in the tort of conspiracy: *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529, [1981] 3 All ER 744, CA. A company may sue its directors when they act improperly on its behalf to cause damage to the company by their conspiracy: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, [1979] 1 All ER 118, CA, approved in *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39 at [140], [2009] 4 All ER 431 at [140], [2010] 1 All ER (Comm) 125 at [140] per Lord Walker of Gestingthorpe. See also *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, CA. As to representative proceedings on behalf of shareholders in an action for conspiracy against the directors of the company see *Prudential Assurance Co Ltd v Newman Industries Ltd* [1981] Ch 229, [1979] 3 All ER 507; *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, [1982] 1 All ER 354, CA.

3 *Quinn v Leathem* [1901] AC 495, HL; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, [1942] 1 All ER 142, HL. Where the primary or predominant purpose of the defendants is to further a legitimate interest but they also intend to injure the claimant it is enough to make the action tortious if they use unlawful means: *Lonrho plc v Fayed* [1992] 1 AC 448 at 463, [1991] 3 All ER 303 at 307, HL, per Lord Bridge of Harwich; *Yukong Line Ltd v Rendsburg Investments Corpn of Liberia (No 2)* [1998] 4 All ER 82, [1998] 1 WLR 294.

4 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, [1981] 2 All ER 456, HL; *Lonrho plc v Fayed* [1992] 1 AC 448, [1991] 3 All ER 303, HL; *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303 at [172], [2008] Ch 244 at [172], [2008] 2 WLR 904 at [172] per Toulson J. As to unlawful means see PARA 625.

5 Damage is an essential element of the cause of action: see *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 439-440, [1942] 1 All ER 142 at 146-147, HL, per Viscount Simon LC; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at 188, [1981] 2 All ER 456 at 463, HL, per Lord Diplock. Where damage is not pleaded, the claim may be struck out: see eg *Ward v Lewis* [1955] 1 All ER 55, [1955] 1 WLR 9, CA. Expense of investigation has been held to suffice as damage: see *British Motor Trade Association v Salvadori*

[1949] Ch 556 at 569, [1949] 1 All ER 208 at 214 per Roxburgh J. Damages for injury to reputation or injury to feelings are not recoverable in a claim for conspiracy: *Lonrho plc v Fayed (No 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489, CA.

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### 625. Conspiracy to cause loss by unlawful means.

An agreement<sup>1</sup> to do an unlawful act is actionable at the suit of someone who suffers damage<sup>2</sup> from it only if there was an intent to injure him, and not if it was merely foreseeable that he might be injured<sup>3</sup>. It need not be shown that the injury was the predominant purpose of the agreement<sup>4</sup>. The liability differs from the general liability for intentionally causing loss by unlawful means<sup>5</sup> in taking a broader view of what is unlawful for these purposes. In conspiracy, it is not necessary for the unlawful conduct to be actionable by the person at whom it was directed, and liability may therefore arise in respect of an agreement to commit a criminal offence that is intended to and does in fact cause loss to the claimant even if the offence is not one that would give rise to tortious liability in the absence of the conspiracy<sup>6</sup>.

An agreement to break a contract<sup>7</sup>, threaten to break a contract<sup>8</sup>, or procure a breach of contract<sup>9</sup>, may suffice for the tort of conspiracy.

1 See PARA 624.

2 See PARA 624.

3 *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, [1981] 2 All ER 456, HL.

4 *Lonrho plc v Fayed* [1992] 1 AC 448, [1991] 3 All ER 303, HL; *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 at [172] per Toulson J.

5 See PARA 621.

6 *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174, [2008] 2 All ER 413 (crime of cheating the revenue), overruling *Powell v Boladz* (1998) 39 BMLR 35 and disapproving dicta in *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia, The Rialto (No 2)* [1998] 4 All ER 82 at 98-101, [1998] 1 WLR 294 at 311-314 per Toulson J, and *Michaels v Taylor Woodrow Developments Ltd* [2001] Ch 493, [2000] 4 All ER 645 at [30]-[34] per Laddie J.

7 *Camden Nominees Ltd v Forcey* [1940] Ch 352 at 365-366, sub nom *Camden Nominees Ltd v Slack* [1940] 2 All ER 1 at 11 per Simonds J; *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271, at [130], CA.

8 See eg *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367, HL. As to the tort of intimidation see PARA 622.

9 As to the tort of inducing breach of contract see PARA 614 et seq. A cause of action for conspiracy to procure a breach of contract is not complete until the intended breach has taken place: *De Jetley Marks v Lord Greenwood* [1936] 1 All ER 863.

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### 626. Conspiracy to injure.

It is a tort to cause damage in pursuance of a conspiracy of which the predominant purpose is to cause injury to another person even if no unlawful means are employed<sup>1</sup>. Conversely, where the primary or predominant purpose of the conspirators is to further or protect some legitimate interest of their own, but they also have the intention of injuring the claimant, it must be shown that they used unlawful means<sup>2</sup>.

The tort may be committed where the conspirators act out of political or religious hatred, or from a spirit of revenge for previous real or fancied injury<sup>3</sup>, but malice in the sense of malevolence is not an element of the cause of action<sup>4</sup>. An admitted desire to punish the claimant is not necessarily decisive for it is consistent with both vindictive vengeance and an intention to deter others from similarly offending<sup>5</sup>. Where the defendants act with mixed motives, feeling that they can kill two birds with one stone by teaching the claimant a lesson at the same time as protecting their own interests, the question is which of these purposes predominated<sup>6</sup>. However, a combination to forward or defend one's own interests or to further some other legitimate object is not actionable even though it involves inevitable harm to another, provided that nothing independently unlawful is done<sup>7</sup>. It is not for the court to determine whether the agreed conduct is reasonably calculated to advance the object of the combiners: the question is one of the defendants' honest belief<sup>8</sup>.

1 This was conclusively decided in *Quinn v Leatham* [1901] AC 495, HL: see *Sorrell v Smith* [1925] AC 700 at 744, HL, per Lord Buckmaster. See also *Gregory v Duke of Brunswick* (1844) 6 Man & G 205, where a conspiracy to hiss an actor was held to be actionable.

2 *Lonrho plc v Fayed* [1992] 1 AC 448 at 463-468, [1991] 3 All ER 303 at 307-312, HL, per Lord Bridge of Harwich. As to the meaning of 'unlawful means' in relation to conspiracy see PARA 625.

3 *Boots v Grundy* (1900) 82 LT 769 at 773 per Phillimore J, cited with approval in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 493, [1942] 1 All ER 142 at 173, HL, per Lord Porter.

4 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 471, [1942] 1 All ER 142 at 162, HL, per Lord Wright.

5 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 475, [1942] 1 All ER 142 at 164-165, HL, per Lord Wright, following Lord Herschell in *Allen v Flood* [1898] AC 1 at 131, HL. See also *Giblan v National Amalgamated Labourers' Union* [1903] 2 KB 600.

6 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 445, [1942] 1 All ER 142 at 149, HL, per Viscount Simon LC, at 478 and 166 per Lord Wright, and at 490 and 172 per Lord Porter. An example is afforded by *Trollope & Sons v London Building Trades Federation* (1895) 72 LT 342, CA, where the principal and primary motive was to injure non-union workmen and the subsidiary motive was to benefit the federation; an interlocutory injunction was granted.

7 *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25, HL; *Sorrell v Smith* [1925] AC 700 at 712, HL, per Viscount Cave LC (cited with approval in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 449, [1942] 1 All ER 142 at 151, HL, per Viscount Maugham, and at 469-470 and 162 per Lord Wright). A trade union is acting with the purpose of furthering a legitimate object when it seeks to increase its membership, or to raise the wages of its members, or pursues other normal union ambitions: see *Denaby and Cadeby Main Colliers v Yorkshire Miners' Association* [1906] AC 384, HL; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, [1942] 1 All ER 142, HL; *JT Stratford & Son v Lindley* [1965] AC 269 at 323, [1964] 3 All ER 102 at 106, HL, per Lord Reid. See also *Thompson v British Medical Association (NSW Branch)* [1924] AC 764 at 770-771, PC (professional body's pursuit of interests of the profession). The question whether any object other than material self-interest may be treated as legitimate in this context was raised but not resolved in *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe* [1958] 3 All ER 220, [1958] 1 WLR 1057.

8 *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 446, [1942] 1 All ER 142 at 150, HL, per Viscount Simon LC, at 469 and 161 per Lord Wright and at 481 and 167 per Lord Porter.

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## 4. TORTS IN SPECIFIC CONTEXTS

### (1) WRONGFUL USE OF PROCESS

#### (i) Malicious Prosecution

##### A. IN GENERAL

##### 627. What is a malicious prosecution.

A malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge<sup>1</sup>. To be actionable as a tort the process must have been without reasonable and probable cause, must have been instituted or carried on maliciously and must have terminated in the claimant's favour<sup>2</sup>. The claimant must also prove damage<sup>3</sup>.

1 *Mohamed Amin v Jogendra Kumar Bannerjee* [1947] AC 322 at 330, PC, per Sir John Beaumont; *Martin v Watson* [1996] AC 74 at 80, [1995] 3 All ER 559 at 562, HL, per Lord Keith of Kinkel; *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 426, [2000] 1 All ER 560 at 565, HL, per Lord Steyn. See also the statement of Crompton J in *Castrique v Behrens* (1861) 3 E & E 709 at 721, cited in *Bynoe v Bank of England* [1902] 1 KB 467 at 470-471, CA, per Collins MR, and in *Everett v Ribbands* [1952] 2 QB 198 at 220, [1952] 1 All ER 823 at 825, CA, per Somervell LJ.

2 See the authorities cited in note 1; and PARA 636.

3 *Savile v Roberts* (1698) 1 Ld Raym 374; *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 426, [2000] 1 All ER 560 at 565, HL, per Lord Steyn.

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##### 628. Malicious prosecution and false imprisonment distinguished.

Malicious prosecution must be distinguished from false imprisonment which, being a form of liability in trespass, is actionable only if the defendant directly causes the claimant's loss of liberty<sup>1</sup>. The intervention of independent legal authority precludes liability in false imprisonment. Where therefore the claimant has been judicially remanded in custody or sentenced to imprisonment following conviction for a criminal offence, on charges brought maliciously by the defendant, there may be liability for malicious prosecution but not for false imprisonment<sup>2</sup>. Conversely, false imprisonment may lie in respect of the claimant's wrongful arrest in connection with a criminal offence even if no prosecution is initiated. Where the defendant falsely and maliciously accuses the claimant to a police officer of having committed an offence, with the result that the officer initiates a prosecution, it is a question of fact whether the defendant, although not technically the prosecutor, is in substance the person responsible for the prosecution being brought, as may for example be the case where the facts relating to the alleged offence are solely within the defendant's knowledge<sup>3</sup>.

A further consequence of false imprisonment being a form of liability in trespass is that, unlike malicious prosecution, it is actionable without proof of damage<sup>4</sup>.

1 *Morgan v Hughes* (1788) 2 Term Rep 225. As to false imprisonment see PARA 542 et seq.

2 *Lock v Ashton* (1848) 12 QB 871 (remand); *Austin v Dowling* (1870) LR 5 CP 534 at 540 per Willes J (commencement of proceedings before judicial officer bringing false imprisonment to an end).

3 *Martin v Watson* [1996] AC 74, [1995] 3 All ER 559, HL. As to whether liability for false imprisonment would arise in respect of the arrest on such facts see *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, CA (the defendant must go beyond merely laying information before the officer for him to take such action as he thought fit and must direct, procure, request or encourage the arrest).

4 As to the requirement of damage in malicious prosecution see PARA 644.

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### 629. What is a prosecution.

A prosecution exists where a criminal charge<sup>1</sup> is made before a judicial officer or tribunal<sup>2</sup>, and any person who makes or is actively instrumental<sup>3</sup> in the making or prosecuting of the charge is deemed to prosecute it, and is called the prosecutor<sup>4</sup>. A person who lays before a magistrate an information stating that he suspects and has good reason to suspect another<sup>5</sup>, or who prefers a bill of indictment<sup>6</sup>, is engaged in a prosecution; and he may be responsible for the prosecution even though the charge made before the magistrate is an oral one<sup>7</sup>, and even though, after making the charge before the magistrate, or even without making one<sup>8</sup>, he is bound over to prosecute and does so<sup>9</sup>.

1 *Rayson v South London Tramways Co* [1893] 2 QB 304, CA; *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 426-427, [2000] 1 All ER 560 at 565, HL, per Lord Steyn. The tort does not extend to disciplinary proceedings even if they may be said to be quasi-criminal in nature and potentially involve serious penalties: *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 430-432, [2000] 1 All ER 560 at 568-570, HL, per Lord Steyn. As to the commencement of criminal proceedings see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1098 et seq. For the purposes of a claim for malicious prosecution, the limitation period does not begin to run until the acquittal of the claimant: *Dunlop v Comrs of Customs and Excise* (1998) 142 Sol Jo LB 134, CA. As to malicious civil proceedings see PARA 659 et seq.

2 See *Austin v Dowling* (1870) LR 5 CP 534 at 540 per Willes J.

3 See PARA 630.

4 *Davis v Noak* (1817) 1 Stark 377; *Dubois v Keats* (1840) 11 Ad & El 329; *Fitzjohn v Mackinder* (1861) 9 CBNS 505. A prosecution is commenced when the information is laid (*R v Willace* (1797) 1 East PC 186, CCR), when the accused is brought before a magistrate (*R v Austin* (1845) 1 Car & Kir 621), or when an indictment is preferred (*R v Killminster* (1835) 7 C & P 228). An informant is unlikely to be a prosecutor in complicated criminal proceedings brought by the Serious Fraud Office: *Mahon v Rahn (No 2)* [2000] 4 All ER 41, [2000] 1 WLR 2150, CA. A witness cannot be regarded as a prosecutor if he made no deliberate attempt to mislead the police: *Hunt v AB* [2009] EWCA Civ 1092, (2009) Times, 28 October, [2009] All ER (D) 244 (Oct). See also **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1071 et seq.

5 *Davis v Noak* (1817) 1 Stark 377.

6 *Payne v Porter* (1618) Cro Jac 490, where a bill of indictment was exhibited before a grand jury. (Grand juries have now been abolished.) As to the modern procedure for preferring a bill of indictment see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARAS 1202-1209.

7 *Clarke v Postan* (1834) 6 C & P 423.

8 *Fitzjohn v Mackinder* (1861) 9 CBNS 505, where the defendant, during the trial of an action, wilfully made a false allegation of perjury against the plaintiff, and was bound over by the judge to prosecute.

9 *Dubois v Keats* (1840) 11 Ad & El 329.

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## **B. PERSONS LIABLE**

### **630. Person liable.**

A person who prosecutes<sup>1</sup> another may be liable as prosecutor; and so may a person who represents himself as prosecutor, even if he did not in fact initiate the prosecution, and is present only as a witness<sup>2</sup>. However, the mere fact that a witness is bound over with another (the real prosecutor) to prosecute and give evidence will not render the witness liable to a claim in respect of the prosecution<sup>3</sup>.

A person who fairly states the facts to a magistrate, and makes no specific charge against anyone, will not be responsible, in a claim for malicious prosecution, to a person against whom the magistrate issues a warrant of arrest<sup>4</sup>.

A person who provides information to the police in such a way as to be actively instrumental in the making or prosecuting of a criminal charge may be liable for malicious prosecution even if he is not technically the prosecutor<sup>5</sup>.

1 As to what is a prosecution see PARA 629.

2 *Clements v Ohrly* (1848) 2 Car & Kir 686. See also *Osterman v Bateman* (1848) 2 Car & Kir 728 (defendant signing indictment as witness in support of it). If during the proceedings the defendant heard himself described as prosecutor, without contradicting it, the jury may infer that he represented himself as such: *Clements v Ohrly* (1847) 2 Car & Kir 686 at 690-691 per Lord Denman CJ.

3 *Eagar v Dyott* (1831) 5 C & P 4. Cf *Dubois v Keats* (1840) 11 Ad & El 329; *Fitzjohn v Mackinder* (1861) 9 CBNS 505. See also *Hunt v AB* [2009] EWCA Civ 1092, (2009) Times, 28 October, [2009] All ER (D) 244 (Oct); and PARA 629.

4 *Leigh v Webb* (1800) 3 Esp 165; *Cohen v Morgan* (1825) 6 Dow & Ry KB 8. See also *Milton v Elmore* (1830) 4 C & P 456.

5 *Martin v Watson* [1996] AC 74, [1995] 3 All ER 559, HL (relevant facts solely within defendant's knowledge); considered in *Hunt v AB* [2009] EWCA Civ 1092, (2009) Times, 28 October, [2009] All ER (D) 244 (Oct). Cf *Danby v Beardsley* (1880) 43 LT 603. A hospital providing pathology reports for the police is not liable for malicious prosecution, as it is not the hospital which set the law in motion: *Evans v London Hospital Medical College* [1981] 1 All ER 715, [1981] 1 WLR 184. An informant is unlikely to be a prosecutor in complicated criminal proceedings brought by the Serious Fraud Office: *Mahon v Rahn (No 2)* [2000] 4 All ER 41, [2000] 1 WLR 2150, CA.

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### **631. Position of magistrate.**

A magistrate who acts as such in a prosecution has been held not to be liable to a claim for malicious prosecution, even though he procures some of the witnesses to appear against the person prosecuted, and though his own name is indorsed as that of a witness on the

indictment<sup>1</sup>. In general, a magistrate has immunity for acts within jurisdiction but may be liable for acts done in bad faith outside his jurisdiction<sup>2</sup>.

1 *Girlington v Pitfield* (1668) 1 Vent 47.

2 See the Courts Act 2003 ss 31-33. See also PARA 458. As to the liability of magistrates generally see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 197 et seq.

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### 632. Liability of employer.

An employer is not liable for a malicious prosecution by his employee<sup>1</sup> unless the prosecution was within the scope of the employee's authority, express or implied<sup>2</sup>. The authority may be general, or a particular or limited authority to act in emergency<sup>3</sup>.

The claimant has to prove malice on the part of the employer or the employee<sup>4</sup>.

No general authority to prosecute can be implied unless the prosecution of an offender falls within the ordinary scope of an employee's duties<sup>5</sup>.

Where an employee's authority is limited to cases of emergency a claimant must show that the emergency existed or might reasonably have been supposed to exist<sup>6</sup>.

1 As to the vicarious liability of employers generally see PARA 680 et seq. As to the liability of principals for torts committed by agents see **AGENCY** vol 1 (2008) PARAS 150-154. Irrespective of the question of his principal's liability, an agent, eg a solicitor, who acts maliciously and without reasonable and probable cause may himself be liable in a claim for malicious prosecution: *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329; see also *Stevens v Midland Counties Rly Co* (1854) 10 Exch 352 (liability of employee). See **AGENCY** vol 1 (2008) PARAS 191-193 (agent's liability for torts); **LEGAL PROFESSIONS** vol 66 (2009) PARA 876.

2 See *Michell v Williams* (1843) 11 M & W 205 at 213; *Stevens v Midland Counties Rly Co* (1854) 10 Exch 352; *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC. A prosecution by one partner in respect of the partnership property does not of itself render the other partners liable for the prosecution: *Arbuckle v Taylor* (1815) 3 Dow 160 at 178, HL, per Lord Eldon LC. A defendant is not deemed to adopt a prosecution begun by his agent without his knowledge or sanction by merely attending the magistrates' court to hear what evidence may be given: *Weston v Beeman* (1857) 27 LJ Ex 57; *Jones v Duck* (1900) Times, 16 March.

3 *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC.

4 See *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA. This decision on malice in defamation seems equally applicable to malicious prosecution. It was held that, although a principal may be liable for the malice of his agent, an innocent agent is not liable for the malice of his principal.

5 *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC. Such an authority might possibly be implied, eg in the case of the general manager of a banking company invested with general supervision and power of control, at least in the absence of his directors, or possibly in the case of a manager conducting the bank's business at a distance from the head office and the directors, but certainly not where he has the opportunity of consulting them: *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC.

6 *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC.

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### 633. Liability of corporations and companies.

A claim for damages for malicious prosecution may be brought against a corporation<sup>1</sup> or an incorporated company<sup>2</sup>. As the corporation or company is liable for a malicious prosecution as if it were an individual the ordinary principles as to the responsibility of employers acting by employees or agents apply and it is a question of fact whether an employee or agent was acting in the scope of his employment or authority<sup>3</sup>.

1 See *Walker v South Eastern Rly Co*, *Smith v South Eastern Rly Co* (1870) LR 5 CP 640; *Bank of New South Wales v Owston* (1879) 4 App Cas 270 at 282, PC, where the defendant's counsel admitted liability of a corporation to such an action; *Edwards v Midland Rly Co* (1880) 6 QBD 287, where Fry J refused to follow *Stevens v Midland Counties Rly Co* (1854) 10 Exch 352; *Cornford v Carlton Bank* [1899] 1 QB 392 (affd [1900] 1 QB 22, CA, where liability to the action was admitted by the defendant's counsel). See also *Rayson v South London Tramways Co* [1893] 2 QB 304, CA.

2 *Leibo v D Buckman Ltd* [1952] 2 All ER 1057, CA.

3 *Citizen's Life Assurance Co v Brown* [1904] AC 423, PC. This case, which is a decision on malice in defamation, seems equally applicable to malicious prosecution. The malice of an employee will also be attributable, in accordance with the ordinary principles of vicarious liability, to a corporation or company sued for malicious prosecution: see PARA 632 note 1.

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### C. PROCEEDINGS IN PARTICULAR COURTS

#### 634. Prosecutions in naval, military or air force courts.

It is doubtful whether the civil courts are competent to inquire into proceedings which took place before a naval, military or air force court-martial or court of inquiry, and whether a prosecution in such a court, when within its jurisdiction, even if malicious and without reasonable and probable cause, can form the basis of a claim in a court of law<sup>1</sup>.

1 In *Sutton v Johnstone* (1785) 1 Term Rep 493, on appeal at 510, 549-550, Exch Ch (affd (1787) 1 Term Rep 784, HL), Lord Mansfield and Lord Loughborough were inclined to lean against acceptance of a claim in the ordinary courts, and to reserve such matters exclusively for military tribunals, for fear that every acquittal in a court-martial would otherwise produce a civil claim, and that military discipline would otherwise decay; but it was not necessary to decide this, as reasonable and probable cause was proved. That view was followed in subsequent cases: see *Warden v Bailey* (1811) 4 Taunt 67; *Dawkins v Lord Rokeby* (1866) 4 F & F 806 at 832-833 per Willes J; *Heddon v Evans* (1919) 35 TLR 642; and (in respect of libel) *Dawkins v Lord Paulet* (1869) LR 5 QB 94; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, Ex Ch (affd (1875) LR 7 HL 744); *Grant v Secretary of State for India* (1877) 2 CPD 445; see also *R v Army Council, ex p Ravenscroft* [1917] 2 KB 504 at 508-509 per Viscount Reading CJ (in respect of mandamus); *Fraser v Hamilton* (1917) 33 TLR 431, CA (action for maliciously causing retirement). The House of Lords, however, in *Fraser v Balfour* (1918) 87 LJB 1116, expressly stated that the House of Lords in *Sutton v Johnstone* (1787) 1 Term Rep 784, HL, did not affirm the broad proposition advanced obiter in the Exchequer Chamber (see above) and that the question was therefore still open: see *Fraser v Balfour* (1918) 87 LJB 1116 at 1118, HL, per Lord Finlay LC.

In *Brooks v Ministry of Defence* (1 March 2002, unreported, QBD), Garland J decline to strike out a claim for malicious prosecution relating to a military disciplinary hearing, counsel for the claimant having submitted that times have moved on as it is now possible to appeal against both conviction and sentence from courts-martial. See further **ARMED FORCES**.

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### **635. Foreign courts.**

A claim may lie in respect of malicious criminal proceedings in a foreign court subject to the same conditions as apply to such proceedings in this jurisdiction<sup>1</sup>.

<sup>1</sup> *Castrique v Behrens* (1861) 3 E & E 709 (following *Bank of Australasia v Nias* (1851) 16 QB 717, DC); *Taylor v Ford* (1873) 29 LT 392.

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## **D. CLAIM FOR MALICIOUS PROSECUTION**

### **636. Elements of a claim for malicious prosecution.**

To succeed in a claim for damages for malicious prosecution a claimant must prove:

- 38 (1) the prosecution by the defendant of a criminal charge against the claimant before a tribunal into whose proceedings the criminal courts are competent to inquire<sup>1</sup>;
- 39 (2) that the proceedings complained of terminated in the claimant's favour<sup>2</sup>;
- 40 (3) that the defendant instituted or carried on the proceedings maliciously<sup>3</sup>;
- 41 (4) that there was an absence of reasonable and probable cause for the proceedings<sup>4</sup>; and
- 42 (5) that the claimant has suffered damage<sup>5</sup>.

<sup>1</sup> As to naval, military and air force courts see PARA 634.

<sup>2</sup> See PARA 637 et seq.

<sup>3</sup> See PARA 639.

<sup>4</sup> See PARAS 640-643.

<sup>5</sup> See PARA 644.

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### **637. Termination of previous proceedings in the claimant's favour.**

In a claim for damages for malicious prosecution it must be alleged and proved that the proceedings have terminated in the claimant's favour because, in the absence of proof, the

court entertaining the claim would be, in effect, a court of appeal from the court in which the prosecution took place<sup>1</sup>.

The rule prevails even where the proceedings complained of have taken place abroad, provided that the foreign court had jurisdiction to entertain them and that the decision was arrived at in such circumstances as to be binding in England and Wales<sup>2</sup>.

It is immaterial that the person convicted had no power of appealing<sup>3</sup>.

1 *Vanderbergh v Blake* (1662) Hard 194; *Parker v Langly* (1714) 10 Mod Rep 209; *Lewis v Farrel* (1718) 1 Stra 114; *Whitworth v Hall* (1831) 2 B & Ad 695; *Castrique v Behrens* (1861) 3 E & E 709 at 721 per Crompton J; *Redway v McAndrew* (1873) LR 9 QB 74 (sufficiency of allegation of termination of proceedings); *Bynoe v Bank of England* [1902] 1 KB 467, CA.

2 *Castrique v Behrens* (1861) 3 E & E 709; *Taylor v Ford* (1873) 29 LT 392. The principle has been applied in a malicious presentment in an ecclesiastical court: see *Fisher v Bristow* (1779) 1 Doug KB 215. As to foreign jurisdiction generally see **CONFLICT OF LAWS**. See also **CIVIL PROCEDURE**.

3 *Basébé v Matthews* (1867) LR 2 CP 684; *Bynoe v Bank of England* [1902] 1 KB 467, CA; *Everett v Ribbands* [1952] 2 QB 198, [1952] 1 All ER 823, CA.

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### **638. When proceedings terminate in the claimant's favour.**

Proceedings terminate in a claimant's favour if a magistrate dismisses the charge<sup>1</sup>, if the proceedings fail because of a defect in the indictment<sup>2</sup>, or because they are void for want of jurisdiction<sup>3</sup>, or are quashed because of an irregularity of procedure<sup>4</sup>, or are discontinued on the defendant being bound over to keep the peace<sup>5</sup>, or are abandoned<sup>6</sup>, or there is an acquittal<sup>7</sup>, even on one part of the indictment<sup>8</sup>. Where an appeal lies from a conviction and no appeal has been made by the person convicted, the proceedings have not terminated in his favour<sup>9</sup>.

Where there has been a successful appeal from a conviction, this is a sufficient termination of the proceedings in the claimant's favour<sup>10</sup>, but it seems that the conviction, although reversed, might be evidence on which the judge might find that there was reasonable and probable cause for the prosecution<sup>11</sup>.

1 *Delegal v Highley* (1837) 3 Bing NC 950.

2 *Savile v Roberts* (1698) 1 Ld Raym 374; *Jones v Gwynn* (1713) 10 Mod Rep 214; *Chambers v Robinson* (1726) 2 Stra 691; *Wicks v Fentham* (1791) 4 Term Rep 247; *Pippet v Hearn* (1822) 5 B & Ald 634.

3 *Jones v Gwynn* (1713) 10 Mod Rep 214 at 220, where it was said that proceedings sufficiently terminate if they are coram non iudice. See also *Atwood v Mongen* (1653) Sty 378.

4 *Herniman v Smith* [1938] AC 305, [1938] 1 All ER 1, HL.

5 *Hourihane v Metropolitan Police Comr* (1994) Independent, 18 January, CA; cf *Everett v Ribbands* [1952] 2 QB 198, [1952] 1 All ER 823, CA (proceedings determined against plaintiff).

6 *Pierce v Street* (1832) 1 LJKB 147. In Australia it has been held that the entry by the Attorney General of a nolle prosequi after an indictment had been filed is a sufficient termination: *Mann v Jacombe* (1961) 78 WN (NSW) 635, following *Gilchrist v Gardner* (1891) 12 LR (NSW) 184; but see *Goddard v Smith* (1704) 6 Mod Rep 261 (not sufficient).

7 *Morgan v Hughes* (1788) 2 Term Rep 225 at 231-232 per Buller J.

8 *Boaler v Holder* (1887) 51 JP 277, where the plaintiff had been indicted for publishing a libel knowing it to be false and was convicted of publishing it only. See also *Boaler v Holder* (1886) 54 LT 298.

9 *Mellor v Baddeley* (1834) 2 Cr & M 675, where Vaughan B stated, at 679, that failure to appeal showed acquiescence in the conviction and was evidence of reasonable and probable cause.

10 See *Mellor v Baddeley* (1834) 2 Cr & M 675. See also *Herniman v Smith* [1938] AC 305, [1938] 1 All ER 1, HL; *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA; *Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432, [1961] 3 All ER 1074, CA; *Blaker v Weller* [1964] Crim LR 311 (in all of these cases, there had been appeals).

11 See *Reynolds v Kennedy* (1748) 1 Wils 232, as explained in *Sutton v Johnstone* (1785) 1 Term Rep 493 at 505-506 per Eyre B. In the earlier of these cases it was held that malice could not be inferred as the original tribunal gave judgment for the defendants but in the later it was said that it would have been more correct if the court had ruled that that fact enabled it to hold that there was reasonable and probable cause. See also *Craig v Hasell* (1843) 4 QB 481. It seems clear that a conviction subsequently reversed is not conclusive evidence of reasonable and probable cause: *Herniman v Smith* [1938] AC 305, [1938] 1 All ER 1, HL.

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### 639. Necessity for malice in fact.

A claimant in a claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact<sup>1</sup> indicating that the defendant was actuated either by spite or ill-will against the claimant, or by indirect or improper motives<sup>2</sup>. However, there is not malice merely because the claimant's conviction was a necessary step towards the defendant's fulfilment of some ulterior objective<sup>3</sup>.

The claimant has the burden of proving malice<sup>4</sup>. In a jury trial the question of malice or no malice is for the jury not for the judge, and if there is any evidence on which the jury could find malice, the judge must leave the question to it<sup>5</sup>. A claimant who proves malice but not want of reasonable and probable cause still fails<sup>6</sup>. Malice may be inferred from want of reasonable and probable cause but lack of reasonable and probable cause is not to be inferred from malice<sup>7</sup>.

1 As to the distinction between malice in fact and malice in law see *Bromage v Prosser* (1825) 4 B & C 247 at 255; *Shearer v Shields* [1914] AC 808 at 813-814, HL, per Viscount Haldane LC.

2 *Hicks v Faulkner* (1881) 8 QBD 167 at 175, DC. See also *Mitchell v Jenkins* (1833) 5 B & Ad 588 at 595 per Parke J; *Haddrick v Heslop and Raine* (1848) 12 QB 267 at 276 per Coleridge J (where the prosecution was for the purpose of stopping the plaintiff's mouth); *Stevens v Midland Counties Rly Co* (1854) 10 Exch 352 (where the defendant's object was to punish some one in order to deter others); *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 455, CA, per Bowen LJ (affd (1886) 11 App Cas 247, HL); *Brown v Hawkes* [1891] 2 QB 718 at 722 per Cave J, and at 728, CA, per Bowen LJ; *Corea v Peiris* [1909] AC 549, PC; *Glinski v Mclver* [1962] AC 726, [1962] 1 All ER 696, HL (alleged purpose of prosecution being to punish plaintiff for giving evidence in other proceedings could be malice). There is no claim for negligent prosecution: *Elgouzouli-Daf v Metropolitan Police Comr* [1995] QB 335, [1995] 1 All ER 833, CA. See also *Thacker v Crown Prosecution Service* (1997) Times, 29 December (negligence or incompetence in bringing or continuing a prosecution cannot in themselves justify an inference of malice).

3 See *Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432, [1961] 3 All ER 1074, CA (ultimate aim of recovering property). Alderson B probably went too far in *Stevens v Midland Counties Rly Co* (1854) 10 Exch 352 at 356, where he said that any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive.

4 *Brown v Hawkes* [1891] 2 QB 718 at 726, CA, per Lord Esher MR. For an example of the claimant failing in his claim for want of proof of malice, although he proved absence of reasonable and probable cause, see *Wershof v Metropolitan Police Comr* [1978] 3 All ER 540.

5 *Mitchell v Jenkins* (1833) 5 B & Ad 588; *Hicks v Faulkner* (1881) 8 QBD 167, DC (affd (1882) 46 LT 130, CA).

6 *Turner v Ambler* (1847) 10 QB 252; *Tempest v Snowden* [1952] 1 KB 130, [1952] 1 All ER 1, CA.

7 *Glinski v Mclver* [1962] AC 726 at 744, [1962] 1 All ER 696 at 700, HL, per Viscount Simonds; *Turner v Ambler* (1847) 10 QB 252; *Johnstone v Sutton* (1786) 1 Term Rep 510, Ex Ch.

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#### 640. Existence of reasonable and probable cause.

It has been said that whether there was reasonable and probable cause for a prosecution or not is a question of fact and not law<sup>1</sup>. However, it is for the judge and not the jury, when there is a trial by a jury, to decide on the relevant facts whether there is reasonable and probable cause<sup>2</sup>. If the facts are disputed, it is the province of the jury to find for the judge what are the relevant facts known to the prosecutor before he made the charge<sup>3</sup>, including the inferences to be drawn from them<sup>4</sup>.

The question whether the defendant in a claim for malicious prosecution had an honest belief that the claimant was guilty of the charge for which the prosecution was brought is a question which may be put to the jury<sup>5</sup>; but there should not be added to it words which may cause the jury to consider whether there was reasonable and probable cause for that belief, as this is a question for the judge<sup>6</sup>, and the question of the defendant's belief should not be put unless there is evidence of his lack of belief<sup>7</sup>. Indeed it may well be preferable in many cases to put to the jury, instead of any question about the defendant's belief, the salient disputed facts on the determination of which the judge may found his decision whether there was or was not reasonable or probable cause<sup>8</sup>. Although malice may be inferred from want of reasonable and probable cause, want of reasonable and probable cause is not to be inferred from malice<sup>9</sup>.

1 *Herniman v Smith* [1938] AC 305 at 316, [1938] 1 All ER 1 at 8, HL, per Lord Atkin, following *Lister v Perryman* (1870) LR 4 HL 521 at 535 per Lord Chelmsford and at 538 per Lord Westbury. The question whether there is any evidence of want of reasonable and probable cause is a question of law: *Tempest v Snowden* [1952] 1 KB 130 at 135, [1952] 1 All ER 1 at 3, CA, per Sir Raymond Evershed MR. It has been said that the claimant must either prove that the defendant did not believe the claimant had been guilty or that a person of ordinary prudence and caution, in view of the facts which he honestly believed, would not conclude that the claimant had been guilty: see *Glinski v Mclver* [1962] AC 726, [1962] 1 All ER 696, HL.

2 *Pain v Rochester and Whitfield* (1602) Cro Eliz 871; *Coxe v Wirrall* (1607) Cro Jac 193; *Johnstone v Sutton* (1786) 1 Term Rep 510 at 545, Ex Ch, per Lord Mansfield and Lord Loughborough; *Broad v Ham* (1839) 5 Bing NC 722; *Panton v Williams* (1841) 2 QB 169, Ex Ch; *Hicks v Faulkner* (1881) 8 QBD 167, DC; *Brown v Hawkes* [1891] 2 QB 718, CA; *Cox v English, Scottish and Australian Bank* [1905] AC 168 at 171, PC; *Herniman v Smith* [1938] AC 305 at 316, [1938] 1 All ER 1 at 8, HL, per Lord Atkin; *Leibo v D Buckman Ltd* [1952] 2 All ER 1057 at 1063, CA, per Denning LJ (dissenting). See also *Gibbons v Alison* (1846) 3 CB 181 (civil proceedings). The decision in *M'Donald v Rooke* (1835) 2 Bing NC 217 that the existence of reasonable and probable cause can in some cases be left to the jury can no longer be regarded as authoritative. The burden of proof of want of reasonable and probable cause is on the claimant: *Cox v English, Scottish and Australian Bank* [1905] AC 168, PC. See also PARA 647. If on undisputed facts the judge holds that there was reasonable and probable cause there will be no case for the jury and the claimant must fail: *Blachford v Dod* (1831) 2 B & Ad 179; *Davis v Hardy* (1827) 6 B & C 225.

3 *Herniman v Smith* [1938] AC 305 at 316, [1938] 1 All ER 1 at 8-9, HL, per Lord Atkin. As to the effect of facts coming to the prosecutor's knowledge after he has commenced the prosecution see PARA 643.

4 *Taylor v Willans* (1831) 2 B & Ad 845; *Panton v Williams* (1841) 2 QB 169, Ex Ch; *Green v De Havilland* (1968) 112 Sol Jo 766.

5 *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 (affd (1886) 11 App Cas 247, HL); *Herniman v Smith* [1938] AC 305 at 316, [1938] 1 All ER 1 at 8-9, HL, per Lord Atkin; *Leibo v D Buckman Ltd* [1952] 2 All ER 1057 at 1072, CA, per Hodson LJ.

6 *Herniman v Smith* [1938] AC 305 at 317, [1938] 1 All ER 1 at 9, HL, per Lord Atkin (disapproving a statement in *Hicks v Faulkner* (1881) 8 QBD 167 at 172, DC, per Hawkins J); *Tempest v Snowden* [1952] 1 KB 130, [1952] 1 All ER 1, CA.

7 *Bradshaw v Waterlow & Sons Ltd* [1915] 3 KB 527, CA; *Herniman v Smith* [1938] AC 305 at 316, [1938] 1 All ER 1 at 8, HL, per Lord Atkin; *Glinski v Mclver* [1962] AC 726, [1962] 1 All ER 696, HL; *Dallison v Caffery* [1965] 1 QB 348, [1964] 2 All ER 610, CA.

8 *Leibo v D Buckman Ltd* [1952] 2 All ER 1057 at 1063-1064, CA, per Denning LJ in his dissenting judgment.

9 *Glinski v Mclver* [1962] AC 726 at 744, [1962] 1 All ER 696 at 700, HL, per Viscount Simonds; *Turner v Ambler* (1847) 10 QB 252; *Johnstone v Sutton* (1786) 1 Term Rep 510, Ex Ch.

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#### **641. Meaning of 'reasonable and probable cause'.**

Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed<sup>1</sup>.

It has been suggested that there may be exceptions to the rule that a belief in the guilt of the accused is necessary in order to constitute reasonable and probable cause for a prosecution, for example where the prosecution feels that the case is so strong against the accused that he must prosecute, although he refuses out of fairness of mind to believe the accused guilty until the court finds him so, or where the prosecutor acts on legal advice<sup>2</sup> that the evidence justifies a prosecution<sup>3</sup>.

In general, however, at least when the accused was in fact innocent<sup>4</sup>, belief in his guilt is essential to the existence of reasonable and probable cause<sup>5</sup>, and such belief must at the date of the prosecution be based on grounds which, or some of which<sup>6</sup>, are reasonable<sup>7</sup>, and arrived at after due inquiry<sup>8</sup>.

1 *Herniman v Smith* [1938] AC 305 at 316, [1938] 1 All ER 1 at 8, HL, per Lord Atkin, approving *Hicks v Faulkner* (1881) 8 QBD 167 at 171, DC, per Hawkins J; *Glinski v Mclver* [1962] AC 726, [1962] 1 All ER 696, HL. See also *Broad v Ham* (1839) 5 Bing NC 722 at 725 per Tindal CJ, who said that reasonable cause is such as would operate on the mind of a discreet man, and probable cause such as would operate on the mind of a reasonable man.

2 As to the effect of taking counsel's opinion before a prosecution and acting upon it see PARA 651 note 1; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 1134. See *Glinski v Mclver* [1962] AC 726 at 745, [1962] 1 All ER 696 at 701, HL, per Viscount Simonds, at 756-757 and 708 per Lord Radcliffe, and at 777 and 721 per Lord Devlin; *Abbott v Refuge Assurance Co* [1962] 1 QB 432 at 450, [1961] 3 All ER 1074 at 1084, CA, per Ormerod LJ (counsel's opinion in favour of prosecution a potent factor but not conclusive).

3 See *Tempest v Snowden* [1952] 1 KB 130 at 139, [1952] 1 All ER 1 at 5, CA, per Denning LJ. See also *Musgrove v Newell* (1836) 1 M & W 582 (see PARA 643 text to note 2); *Phillips v Naylor* (1859) 4 H & N 565, Ex Ch, where the prosecution acted in good faith under a mistaken view of the law; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 365 per Bramwell B; *Tims v John Lewis & Co Ltd* [1951] 2 KB 459 at 472, CA, where Lord Goddard CJ stated that the existence of reasonable and probable cause is to be determined objectively and not subjectively; *Leibo v D Buckman Ltd* [1952] 2 All ER 1057 at 1069, CA, per Jenkins LJ. It has

been said that a person who, on the strength of circumstances of grave suspicion which are insufficient to convince him of the guilt of the person concerned, institutes an unsuccessful prosecution under a sense of public duty would have a defence to a claim of malicious prosecution, not because there was reasonable and probable cause, but because he could negative malice: *Shrosbery v Osmaston* (1877) 37 LT 792 at 795 per Lindley J.

4 When the jury is satisfied that the claimant, although acquitted, was in fact guilty of the charge complained of, the defendant's belief seems to be immaterial: *Heslop v Chapman* (1853) 23 LJQB 49 at 52, Ex Ch; *Leibo v D Buckman Ltd* [1952] 2 All ER 1057 at 1063-1065, CA, per Denning LJ (dissenting). Cf *Bank of New South Wales v Piper* [1897] AC 383, PC, where as the plaintiff plainly knew that he had committed the offence for which he was prosecuted, it was held unnecessary to ask the jury if the defendant had an honest belief in the plaintiff's guilt. A private citizen who gives the police an honest and reasonably accurate account of an event, and who believes and acts on the advice of a responsible police officer, has reasonable and probable cause: *Malz v Rosen* [1966] 2 All ER 10, [1966] 1 WLR 1008.

5 *Ravenga v Mackintosh* (1824) 2 B & C 693; *Broad v Ham* (1839) 5 Bing NC 722; *Hinton v Heather* (1845) 14 M & W 131; *Turner v Ambler* (1847) 10 QB 252; *Haddrick v Heslop Raine* (1848) 12 QB 267 at 274 per Lord Denman CJ; *Heslop v Chapman* (1853) 23 LJQB 49; *Williams v Banks* (1859) 1 F & F 557; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 351 per Cleasby B; *Leibo v D Buckman Ltd* [1952] 2 All ER 1057, CA; *Glinski v Mclver* [1962] AC 726, [1962] 1 All ER 696, HL. See also PARA 643.

6 *Hailes v Marks* (1861) 7 H & N 56.

7 *Hicks v Faulkner* (1881) 8 QBD 167; affd (1882) 46 LT 130, CA. See also *Michell v Williams* (1843) 11 M & W 205; *Douglas v Corbett* (1856) 6 E & B 511; *Wright v Sharp* (1947) 176 LT 308; *Wershof v Metropolitan Police Comr* [1978] 3 All ER 540; *Coudrat v Revenue and Customs Comrs* [2005] EWCA Civ 616, [2005] STC 1006 (reasonable to proceed on basis of largely circumstantial evidence).

8 *Lister v Perryman* (1870) LR 4 HL 521; *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, CA; *Abrath v North Eastern Rly Co* (1883) 11 QBD 440, CA (affd (1886) 11 App Cas 247, HL); *Brown v Hawkes* [1891] 2 QB 718, CA. As to the limit of the prosecutor's duty to test the facts see PARA 642. A question whether the defendant instituted proper inquiries before taking action should not be left to the jury unless there is evidence of his not having made proper inquiries: see *Bradshaw v Waterlow & Sons Ltd* [1915] 3 KB 527, CA, where it was also said that there could not be an absence of reasonable and probable cause when the Attorney General had granted his fiat for the prosecution and it was not shown that the facts were put before him unfairly. Similarly, the question whether the defendant honestly believed in the charge which he made ought not to be left to the jury unless there is some evidence of the absence of that belief: see PARA 640.

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#### **642. Grounds for prosecutor's belief.**

The presence of reasonable and probable cause for a prosecution does not depend upon the actual existence, but upon a reasonable belief held in good faith in the existence, of such facts as would justify a prosecution<sup>1</sup>. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action; his duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution<sup>2</sup>. The belief in the existence of such facts as would justify a prosecution, or the belief in the accused's guilt, may arise out of the recollection of the prosecutor, if he has always found his memory trustworthy<sup>3</sup>, or out of information furnished to him by others and accepted by him as true<sup>4</sup>.

There may be reasonable and probable cause for preferring a criminal charge even though the prosecutor has before him only prima facie evidence<sup>5</sup>, or such as might not be admissible before a jury<sup>6</sup>, and the question will be whether the impression produced on the mind of the prosecutor by the facts before him was such as would be produced on the mind, not of a lawyer, but of a discreet and reasonable man<sup>7</sup>.

The absence of corroboration of an accomplice's statement is not evidence of want of reasonable and probable cause<sup>8</sup>.

Where a prosecutor had nothing before him but circumstances of mere suspicion<sup>9</sup>, or where he knew that the acts on which the prosecution was founded were done openly and in good faith in assertion of a legal right, there is in general no reasonable and probable cause<sup>10</sup>.

1 *Hicks v Faulkner* (1881) 8 QBD 167 at 173, DC. See also PARA 641. It will be assumed, until the contrary is shown, that the prosecutor, before prosecuting, was acquainted with the substance of the evidence which his witnesses afterwards gave: *Walker v South Eastern Rly Co*, *Smith v South Eastern Rly Co* (1870) LR 5 CP 640 at 644.

2 *Herniman v Smith* [1938] AC 305 at 319, [1938] 1 All ER 1 at 10, HL, per Lord Atkin; *Glinski v McIver* [1962] AC 726, [1962] 1 All ER 696, HL; *Dallison v Caffery* [1965] 1 QB 348, [1964] 2 All ER 610, CA.

3 *Hicks v Faulkner* (1881) 8 QBD 167 at 172-173, DC.

4 *Lister v Perryman* (1870) LR 4 HL 521 at 536 per Lord Chelmsford, and at 538 per Lord Westbury; *Hicks v Faulkner* (1881) 8 QBD 167 at 173. A prosecutor is entitled to act upon reasonable hearsay evidence (*Chatfield v Comerford* (1866) 4 F & F 1008; *Lister v Perryman* (1870) LR 4 HL 521), but the omission to sift information which appears to be suspicious may be evidence of the want of reasonable and probable cause (*Lister v Perryman* (1870) LR 4 HL 521; *Brown v Hawkes* [1891] 2 QB 718 at 728, CA, per Kay LJ).

5 *Dawson v Vansandau* (1863) 11 WR 516; *Glinski v McIver* [1962] AC 726, [1962] 1 All ER 696, HL. See also *Coudrat v Revenue and Customs Comrs* [2005] EWCA Civ 616, [2005] STC 1006 (largely circumstantial evidence).

6 *Hicks v Faulkner* (1881) 8 QBD 167, DC; affd (1882) 46 LT 130, CA. See also the cases cited in note 4.

7 *Lister v Perryman* (1870) LR 4 HL 521.

8 *Bradshaw v Waterlow & Sons Ltd* [1915] 3 KB 527, CA.

9 See eg *Clements v Ohrly* (1847) 2 Car & Kir 686 (similarity of handwriting). Cf *Marham v Pescod* (1606) Cro Jac 130 (possession of stolen goods). See also *Roberts v Orchard* (1863) 2 H & C 769 at 777, Ex Ch, per Willes J; *Leete v Hart* (1868) LR 3 CP 322 at 324 per Byles J; *Chamberlain v King* (1871) LR 6 CP 474 at 478 per Willes LJ.

10 *Huntley v Simson* (1857) 2 H & N 600 (cf *Corea v Peiris* [1909] AC 549, PC). Circumstances of suspicion against the claimant in connection with other matters, if known to the defendant at the time, afford evidence of reasonable and probable cause: *Wilkinson v Foote* (1856) 5 WR 22. See also *Brooks v Warwick* (1818) 2 Stark 389; *James v Phelps* (1840) 11 Ad & El 483; *Hinton v Heather* (1845) 14 M & W 131, where the defendant knew that he, and not the plaintiff, was in the wrong.

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### 643. Prosecutor's knowledge at time of prosecution.

The existence of reasonable and probable cause for a prosecution is not sufficient unless the facts which constituted it were known to the prosecutor at the time of the prosecution<sup>1</sup>, but, if he did know those facts, the benefit of such knowledge is not necessarily displaced by the subsequent communication of some other fact, which, although it might affect the mind of a reasonable man and may affect the prosecutor's conviction of the guilt of the accused, does not alter the facts already known to him<sup>2</sup>. However, if in the course of the prosecution something comes to light which shows it to be groundless, there is, it seems, no reasonable or probable cause for continuing the prosecution<sup>3</sup>.

1 *Delegal v Highley* (1837) 3 Bing NC 950; *Turner v Ambler* (1847) 10 QB 252; *Heslop v Chapman* (1853) 23 LQB 49, Ex Ch; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 351-353 per Cleasby B. If it then



existed, the burden of proof would be on the claimant to show that the defendant did not know of it: *Brooks v Blain* (1869) 39 LJCP 1.

2 *Musgrove v Newell* (1836) 1 M & W 582 (discussed in *Tempest v Snowden* [1952] 1 KB 130 at 139, [1952] 1 All ER 1 at 5, CA, per Denning LJ) (representations as to good character of persons accused).

3 *Tims v John Lewis & Co Ltd* [1951] 2 KB 459 at 472, CA, per Lord Goddard CJ.

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#### **644. Damage.**

To support a claim for damages for malicious prosecution, one of three heads of damage must be shown. The damage may be: (1) damage to a man's fame, as where the matter of which he is accused is scandalous; or (2) damage done to the person, as where his life, limb or liberty is endangered; or (3) damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged<sup>1</sup>. The claimant must show that any damage to fame suffered was a necessary and natural consequence of the charge itself, and as regards the second head of damage, that actual loss of liberty was suffered<sup>2</sup>. Once one of these heads of damage is proved, damages are at large and may include compensation for loss of reputation and injured feelings<sup>3</sup>.

1 *Savile v Roberts* (1698) 1 Ld Raym 374 at 378 per Holt CJ; *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA, where the plaintiff was allowed 15 guineas costs on being acquitted on a charge of pulling a train's communication cord, but in her action for malicious prosecution was awarded the additional £64 2s legal expenses which she incurred, since there is no presumption that in criminal proceedings (unlike in civil proceedings) a successful party will be allowed costs.

2 *Berry v British Transport Commission* [1961] 1 QB 149, [1960] 3 All ER 322. On appeal the Court of Appeal found damage under head (3) and did not comment on the rulings of Diplock J in regard to heads (1) and (2): *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA. It remains uncertain whether the obiter dicta in *Wiffen v Bailey and Romford UDC* [1915] 1 KB 600, CA, to the effect that it is enough if the crime is punishable by imprisonment even though the claimant has not been sentenced to imprisonment, are good law.

3 *Wershof v Metropolitan Police Comr* [1978] 3 All ER 540. A claimant's conduct may be relevant to the question of the award of exemplary damages: *Bishop v Metropolitan Police Comr* [1990] 1 LS Gaz R 30, (1989) 133 Sol Jo 1626, CA.

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#### **E. PROOF OF CLAIM**

##### **645. Mode of proof of trial and conviction or acquittal.**

Where it is necessary to prove the trial and conviction or acquittal of a person charged with an indictable offence, the record or a copy of it need not be produced, but it is sufficient to produce what purports to be a certificate by the proper officer of the court where such conviction or acquittal took place of the indictment, trial, conviction or acquittal<sup>1</sup>. Rules have been made as to the proof of proceedings in magistrates' courts<sup>2</sup>.

1 Evidence Act 1851 s 13 (amended by the Statute Law Revision Act 1892; the Access to Justice Act 1999 s 90(1), Sch 13 para 2(1), (2), (3); and the Courts Act 2003 s 109(1), Sch 8 para 34).

2 See the Magistrates' Courts Rules 1981, SI 1981/552, r 68; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1501.

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#### **646. Burden on the claimant in first instance.**

The burden of proof in a claim for damages for malicious prosecution lies in the first instance on the claimant<sup>1</sup>. It is not sufficient for him to prove that he was innocent of the crime for which he was prosecuted by the defendant by proving that the prosecution terminated in his favour; he must also show that the defendant acted maliciously and without reasonable and probable cause<sup>2</sup>.

1 As to the burden of proof see generally **CIVIL PROCEDURE** vol 11 (2009) PARA 769 et seq.

2 See *Cox v English, Scottish and Australian Bank* [1905] AC 168 at 170, PC, per Lord Davey, citing *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 455, CA, per Bowen LJ (affd (1886) 11 App Cas 247, HL); *Corea v Peiris* [1909] AC 549, PC; and PARA 652. As to the position where it is shown that there was no reasonable or probable cause for some of the charges, or part of the charge, preferred against the claimant see PARA 653.

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#### **647. Shifting the burden of proof.**

If want of reasonable care on the part of the defendant is relied upon, that, as an element in the absence of reasonable and probable cause, must be proved by the claimant<sup>1</sup>; and so if facts existed which, if known to the defendant, would have constituted reasonable and probable cause, the burden of showing that they were not known to him would lie on the claimant<sup>2</sup>. The burden of proof, in the sense of the burden of adducing evidence, is not stationary; when the claimant has given such evidence as, if not answered, will entitle him to a verdict, the burden of proof is shifted to the defendant<sup>3</sup>.

1 *Abrath v North Eastern Rly Co* (1883) 11 QBD 440, CA; affd (1886) 11 App Cas 247, HL. It was there said that the want of reasonable care on the part of the prosecutor to inform himself of the true state of the case was a 'fundamental fact' in the determination of the question of reasonable and probable cause, as distinguished from mere evidence of it: see *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 450-451, CA, per Brett MR, and at 460 per Bowen LJ. Lord Bramwell, however, doubted this in (1886) 11 App Cas 247 at 254. Orders to provide further information as to the grounds which the defendant had for instituting the prosecution are not generally made (see *Maass v Gas Light and Coke Co* [1911] 2 KB 543, CA), but this may need re-consideration in light of legal developments (see *Gibbs v Rea* [1998] AC 786 at 794, [1998] 3 WLR 72 at 77, PC). See also **CIVIL PROCEDURE**. It is settled practice that the claimant is not entitled to particulars of reasonable and probable cause when the defence merely denies want of reasonable and probable cause: *Roberts v Owen* (1890) 6 TLR 172, DC; *Weinberger v Inglis* [1918] 1 Ch 133; *Stapeley v Annetts* [1969] 3 All ER 1541, [1970] 1 WLR 20, CA, where Lord Denning (at 1542 and 23) said that the contrary statement in *Alman v Oppert* [1901] 2

KB 576 at 578, CA, per Collins LJ was an error. It is only where the defendant puts forward a positive allegation of reasonable and probable cause that he should be required to give particulars of it: *Stapeley v Annetts* [1969] 3 All ER 1541 at 1542, [1970] 1 WLR 20 at 22, CA, per Lord Denning MR. As to the procedure for obtaining further information see CPR Pt 18; and **CIVIL PROCEDURE**.

2 *Brooks v Blain* (1869) 39 LJP 1.

3 *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 456, CA, per Bowen LJ.

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#### **648. Inference of malice from want of reasonable and probable cause.**

Those facts which constitute the want of reasonable and probable cause may also supply evidence of malice<sup>1</sup>. However, if there is no other evidence of malice than what in the judge's opinion<sup>2</sup> establishes a want of reasonable and probable cause, any jury, upon the question of malice, is not bound by that opinion, but may determine for itself whether there was such a want of reasonable and probable cause as to amount to malice<sup>3</sup>. If the defendant, in prosecuting the claimant, honestly believed in his guilt, the jury should not infer malice if the only evidence of it is the absence of reasonable and probable cause<sup>4</sup>.

1 *Parrott v Fishwick* (1772) 9 East 362n; *Johnstone v Sutton* (1786) 1 Term Rep 510 at 545, Ex Ch; *Mitchell v Jenkins* (1833) 5 B & Ad 588; *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 687, CA per Brett MR, and at 694 per Bowen LJ; *Mills v Kelvin and James White Ltd* 1913 SC 521; *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 at 49, CA, per Warrington LJ. As to malice see further PARAS 639, 649 et seq.

2 For the principle that it is for the judge to decide whether there is reasonable and probable cause see PARA 640.

3 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 687, CA, per Brett MR, approving *Hicks v Faulkner* (1881) 8 QBD 167 at 174-175, DC.

4 *Brown v Hawkes* [1891] 2 QB 718, CA; *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44 at 55, CA, per Atkin LJ. See also *Stewart v Beaumont* (1866) 4 F & F 1034.

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#### **649. Further instances in which malice may be inferred.**

Where the justification alleged for a prosecution shows a gross ignorance of law, malice may be inferred by any jury<sup>1</sup>.

Again, the advertising of the indictment by the defendant is evidence of malice<sup>2</sup>, and so is improper conduct on his part in substantiating it<sup>3</sup>. The fact that the defendant has on a previous occasion made a charge against the claimant would also seem to be evidence of malice<sup>4</sup>.

Where the prosecutor knows that the accused is innocent there is, of course, clear evidence of malice, and the fact that he was bound on his recognisances to prosecute will be no answer to an action<sup>5</sup>.

- 1 *Brooks v Warwick* (1818) 2 Stark 389. Cf *Snow v Allen* (1816) 1 Stark 502, where the defendant was advised by his solicitor on the authority of a reported case that he was acting rightly.
- 2 *Chambers v Robinson* (1726) 2 Stra 691.
- 3 *Heath v Heape* (1856) 1 H & N 478.
- 4 Cf the analogous rule in defamation: *Barrett v Long* (1851) 3 HL Cas 395.
- 5 *Dubois v Keats* (1840) 11 Ad & El 329; *Fitzjohn v Mackinder* (1861) 9 CBNS 505.

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### 650. Where malice is not implied.

The mere fact that the claimant was acquitted for want of prosecution does not prove malice<sup>1</sup>. Where the motives of the defendant are mixed the claimant will fail unless he establishes that the dominant purpose is something other than the vindication of the law<sup>2</sup>.

- 1 *Purcell v Macnamara* (1808) 9 East 361. See also *Sykes v Dunbar* (1799) 1 Camp 201n.
- 2 *Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432, [1961] 3 All ER 1074, CA.

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### 651. Proof by the defendant.

The defendant in a claim for damages for malicious prosecution may give evidence of all the facts that were before his mind at the time of the prosecution, whether for the purpose of negating malice or of establishing reasonable and probable cause<sup>1</sup>.

- 1 *Thomas v Russell* (1854) 9 Exch 764 at 765 per Pollock CB. See also *Abrath v North Eastern Rly Co* (1883) 11 QBD 440, CA; affd (1886) 11 App Cas 247, HL. The fact that the defendant relied on the opinion of counsel may afford a defence, but only if the opinion was founded on a fair statement of the facts, and was acted on in good faith: *Hewlett v Cruchley* (1813) 5 Taunt 277; *Ravenga v Mackintosh* (1824) 2 B & C 693; *Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432 at 455-456, [1961] 3 All ER 1074 at 1087-1088, CA, per Upjohn LJ; *Glinski v McIver* [1962] AC 726 at 745, [1962] 1 All ER 696 at 701, HL, per Viscount Simonds, at 756-757 and 708 per Lord Radcliffe, and at 777 and 721 per Lord Devlin; *Malz v Rosen* [1966] 2 All ER 10, [1966] 1 WLR 1008. The same approach applies in respect of reliance on the advice of a police officer: *Riches v DPP* [1973] 2 All ER 935, [1973] 1 WLR 1019, CA. See also *Reynolds v Metropolitan Police Comr* [1985] QB 881, [1984] 3 All ER 649, CA (advice of Director of Public Prosecutions). See also **LEGAL PROFESSIONS** vol 66 (2009) PARA 1134.

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**652. Only slight evidence of absence of reasonable and probable cause is necessary.**

In proving the absence of reasonable and probable cause in a claim for damages for malicious prosecution the claimant has to prove a negative, and, in general, need only give slight evidence of that<sup>1</sup>.

However, absence of reasonable and probable cause cannot be inferred from the most express malice<sup>2</sup>. The mere innocence of the claimant is not *prima facie* proof of its absence<sup>3</sup>, and the fact that no indictment was preferred<sup>4</sup>, or that the defendant did not give evidence at the trial although he was present in court<sup>5</sup>, does not prove it.

1 *Cotton v James* (1830) 1 B & Ad 128 at 133 per Lord Tenterden CJ; *Taylor v Willans* (1831) 2 B & Ad 845 at 857 per Lord Tenterden CJ. Cf *Fish v Scott* (1792) Peake 135. A jury, if any, should not be asked whether the defendant had an honest belief in the guilt of the claimant unless there is evidence of want of reasonable and probable cause: *Trebeck v Croudace* [1916-1917] All ER Rep 441, CA (the issue is omitted from the report in [1918] 1 KB 158). See also PARA 640. It would seem that the burden of proof is on the claimant to put in the depositions: see *Lea v Charrington* (1889) 5 TLR 218 at 219 (on appeal 23 QBD 45, DC; affd 23 QBD 272, CA). The defendant cannot rely on the depositions of the witnesses in his favour, but must call the witnesses: *Jackson v Bull and Alison* (1838) 2 Mood & R 176.

2 *Anon* (1703) 6 Mod Rep 73; *Johnstone v Sutton* (1786) 1 Term Rep 510 at 545, Ex Ch; *Incleidon v Berry* (1805) 1 Camp 203n; *Turner v Ambler* (1847) 10 QB 252; *Glinski v McIver* [1962] AC 726 at 744, [1962] 1 All ER 696 at 700, HL, per Viscount Simonds.

3 See PARA 646. The proof of innocence may, however, involve with it other circumstances, eg that the prosecutor knew that his evidence was false, which would show that there was no reasonable and probable cause: *Abrath v North Eastern Rly Co* (1883) 11 QBD 440 at 462, CA, per Bowen LJ. See also Buller's Law of Nisi Prius (5th Edn) 14.

4 *Wallis v Alpine* (1805) 1 Camp 204n.

5 *Taylor v Willans* (1831) 2 B & Ad 845. See also *Incleidon v Berry* (1805) 1 Camp 203n; *Purcell v Macnamara* (1808) 9 East 361. From this fact, however, a want of reasonable and probable cause may be inferred: *Taylor v Willans* (1831) 2 B & Ad 845 at 857 per Lord Tenterden CJ. See also *Shufflebottom v Allday* (1857) 5 WR 315.

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**653. Proof of absence of reasonable and probable cause on some charges only.**

If the claimant in a claim for damages for malicious prosecution was indicted on more than one charge, it is sufficient for him to show that there was no reasonable and probable cause for some of the charges in the indictment, although there may have been cause for others<sup>1</sup>. If the indictment contained only one charge, it is in general sufficient for the claimant to show that there was no reasonable and probable cause for part of the charge<sup>2</sup>.

1 *Reed v Taylor* (1812) 4 Taunt 616; *Ellis v Abrahams* (1846) 8 QB 709. See also *R v Prosser* (circa 1770), cited in 1 Term Rep at 533; *Delisser v Towne* (1841) 1 QB 333; *Boaler v Holder* (1886) 54 LT 298; *Boaler v Holder* (1887) 51 JP 277.

2 *Palmer v Birmingham Manufacturing Co* (1902) 18 TLR 552 (charge of larceny of several articles; absence of reasonable and probable cause as to some of articles); *Leibo v D Buckman Ltd* [1952] 2 All ER 1057, CA (charge of stealing £35, later reduced to £27 3s; evidence on which jury entitled to hold that prosecutor had no honest belief in plaintiff's guilt as regards any part of money alleged to have been stolen; even assuming that

prosecutor had reasonable and probable cause for preferring charge in respect of one sum of £7 1s, plaintiff entitled to judgment). It has been suggested that in such a case the question might resolve itself into one of degree, and that, if the theft of 20s was charged and reasonable and probable cause was shown as regards 19s, the prosecutor, if sued for malicious prosecution, might be entitled to succeed, even if in making the charge he acted maliciously, while if reasonable and probable cause was shown as to 1s only, he would not be so entitled: see *Leibo v D Buckman Ltd* [1952] 2 All ER 1057 at 1071, CA, per Jenkins LJ.

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#### **654. Disbelief in the claimant's guilt.**

If the facts before the defendant when prosecuting *prima facie* amounted to reasonable and probable cause, but the defendant did not believe the claimant to be guilty and he was not so in fact, it seems that in general the want of such belief is conclusive evidence of the want of reasonable and probable cause<sup>1</sup>. However, there may be exceptions to the rule that a belief in the guilt of the claimant is essential to the existence of reasonable and probable cause<sup>2</sup>. The claimant must prove the absence of such a belief if he alleges that it was absent<sup>3</sup>. The question whether such a belief existed ought not to be left to any jury unless there is some evidence that it was absent<sup>4</sup>.

1 *Broad v Ham* (1839) 5 Bing NC 722. See the cases cited in PARA 641 note 5; and note 3.

2 See PARA 641.

3 *Turner v Ambler* (1847) 10 QB 252. See also *Delegal v Highley* (1837) 3 Bing NC 950; *Lister v Perryman* (1870) LR 4 HL 521. As to the sufficiency of grounds of belief see PARA 642. As to the use of orders for further information see PARA 647 note 1; and **CIVIL PROCEDURE**.

4 See PARA 640.

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#### **655. Matters not amounting to evidence.**

The fact that the jury took time to consider its verdict before acquitting an accused person is no proof of reasonable and probable cause<sup>1</sup>.

Neither the observations of the judge at the trial of the indictment<sup>2</sup>, nor the observations of the magistrate in dismissing a charge, or of a jury in acquitting<sup>3</sup>, can be used by the claimant as evidence<sup>4</sup>.

On the issue of reasonable and probable cause evidence is probably not admissible at all to prove the claimant's bad character<sup>5</sup>.

1 *Willans v Taylor* (1829) 3 Moo & P 350 at 365 per Park J, not following *Smith v Macdonald* (1799) 3 Esp 7.

2 *Barker v Angell* (1841) 2 Mood & R 371, not following *Warne v Terry* (1836) unreported per Littledale J, there cited.

3 *Hibberd v Charles* (1860) 2 F & F 126.

4 *Wetzlar v Zachariah* (1867) 16 LT 432. Cf *Richards v Turner* (1840) Car & M 414. On principle, such observations would appear to be equally inadmissible for the defendant. Indeed, the reasons given by Mellor J in *Wetzlar v Zachariah* (1867) 16 LT 432 (inability of the prisoner to reply), apply rather to evidence against the claimant than for him: see *Brown v Foster* (1857) 1 H & N 736, where the plaintiff's counsel at the magistrates' court was called by the defendant at the trial as to the possible alteration by the plaintiff, during a remand, of a book produced in evidence.

5 See **CIVIL PROCEDURE** vol 11 (2009) PARA 801.

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### **656. Matters to be pleaded.**

A claimant must expressly state in his particulars of claim<sup>1</sup>:

- 43 (1) the previous proceedings instituted by the defendant of which he complains<sup>2</sup>;
- 44 (2) that in so far as they were capable of doing so they terminated in his favour<sup>3</sup>;
- 45 (3) that there was no reasonable and probable cause for the defendant instituting or carrying on those proceedings<sup>4</sup>;
- 46 (4) that the defendant was actuated by malice<sup>5</sup>; and
- 47 (5) that he has suffered damage<sup>6</sup>.

1 As to particulars of claim see generally **CIVIL PROCEDURE**.

2 See PARA 629.

3 *Basébé v Matthews* (1867) LR 2 CP 684; *Redway v McAndrew* (1873) LR 9 QB 74; *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 216, HL, per Lord Selbourne LC, and at 228 per Lord Fitzgerald. See also PARAS 637-638.

4 See PARA 640 et seq.

5 See PARAS 639, 648 et seq.

6 See PARA 644. As to pleading damage see **DAMAGES** vol 12(1) (Reissue) PARA 1145 et seq. See also **CIVIL PROCEDURE**.

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## **F. TRIAL BY JURY**

### **657. Right to trial by jury.**

On the application of any party to an action in respect of malicious prosecution<sup>1</sup> to be tried in the Queen's Bench Division, the action must be tried with a jury unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury<sup>2</sup>.

1 See the Senior Courts Act 1981 s 69(1)(b). As to the making of applications see s 69(2); and **CIVIL PROCEDURE** vol 12 (2009) PARA 1132. As to the renaming of the Senior Courts Act 1981 see PARA 470 note 2. The right to trial by jury under s 69(1) is restricted to malicious prosecution in criminal matters and there is no right to jury trial in respect of the malicious presentation of a petition in bankruptcy: *Woodward v IRC* (2002) 73 TC 516. The court has a discretion to order a jury trial in such a case: Senior Courts Act 1981 s 69(3).

2 Senior Courts Act 1981 s 69(1). See also **CIVIL PROCEDURE**. This does not affect the court's power to order different questions of fact in an action to be tried by different modes of trial: see s 69(4). As to the right to trial by jury in a county court see **CIVIL PROCEDURE** vol 12 (2009) PARA 1132. Scientific investigation includes a medical investigation: *Darragh v Chief Constable of Thames Valley Police* [1998] 43 LS Gaz R 32, (1998) Times, 20 October, CA.

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## (ii) Malicious Procurement of Issue of Search Warrant

### 658. When the claim lies.

A claim<sup>1</sup> lies where a person falsely and maliciously<sup>2</sup> and without reasonable and probable cause<sup>3</sup> procures the issue of a search warrant to the damage of another person<sup>4</sup>. However, where a person fairly and honestly lays the facts on which he relies and on which he bases his suspicions before a magistrate who then orders the issue of a search warrant, he is not liable for the exercise of the magistrate's discretion<sup>5</sup>.

1 The claim is analogous to malicious prosecution, as to which see PARA 627. See *Reynolds v Metropolitan Police Comr* [1985] QB 881, [1984] 3 All ER 649, CA; *Gibbs v Rea* [1998] AC 786, [1998] 3 WLR 72, PC.

2 'Malice' in this tort means spite, ill-will, improper motive or intentional abuse of the process of the court: see *Gibbs v Rea* [1998] AC 786 at 797, [1998] 3 WLR 72, PC. An application in the first instance for separate search warrants against two different persons in respect of one thing suspected to be stolen does not necessarily show malice: *Utting v Berney* (1888) 5 TLR 39. As to malice see also PARAS 639, 648 et seq.

Incompetence or negligence on the part of the police will not entitle a person to bring a claim for damages on these grounds: *Keegan v Chief Constable of Merseyside Police* [2003] EWCA Civ 936, [2003] 1 WLR 2187. Cf the view taken by the European Court of Human Rights: Application 28867/03 *Keegan v United Kingdom* (2006) 44 EHRR 716, [2006] All ER (D) 235 (Jul), ECtHR (breaking into home, mistakenly believing suspect lived there, infringed the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) arts 8 and 13).

3 As to want of reasonable and probable cause see generally PARA 640 et seq.

4 See *Cooper v Booth* (1785) 3 Esp 135 at 144 (cited in argument sub nom *Boot v Cooper* in *Johnstone v Sutton* (1786) 1 Term Rep 510 at 535, Ex Ch); *Elsee v Smith* (1822) 1 Dow & Ry KB 97; *Hensworth v Fowkes* (1833) 4 B & Ad 449; *Wyatt v White* (1860) 5 H & N 371. See also *Everett v Ribbands* [1952] 2 QB 198 at 205, [1952] 1 All ER 832 at 826, CA, per Denning LJ; *Reynolds v Metropolitan Police Comr* [1985] QB 881, [1984] 3 All ER 649, CA. An essential of the claim for malicious prosecution is that the proceedings maliciously instituted by the defendant must have terminated in the claimant's favour (see PARA 637); this is not a requirement of a claim for malicious procurement of the issue of a search warrant because the application for a search warrant, being granted on information without notice, is incapable of terminating in the claimant's favour (see the cases above). As to warrants to search for stolen goods see the Theft Act 1968 s 26; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 306.

5 *Hope v Evered* (1886) 17 QBD 338 at 340, DC, per Lord Coleridge CJ; *Lea v Charrington* (1889) 23 QBD 45, DC (on appeal 23 QBD 272, CA). See also *Leigh v Webb* (1800) 3 Esp 165; *Elsee v Smith* (1822) 1 Dow & Ry KB 97. There is no tort of maliciously refusing bail: see *Gizzonio v Chief Constable of Derbyshire* (1998) Times, 28 April, CA.



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### (iii) Malicious Civil Proceedings

#### 659. Malicious civil proceedings generally.

The tort of malicious proceedings is not at present generally available in respect of civil proceedings, and has only been admitted in a civil context in a few special cases of abuse of legal process<sup>1</sup>. These include malicious institution of bankruptcy or winding-up proceedings<sup>2</sup>, malicious arrest or detention<sup>3</sup>, malicious execution against property<sup>4</sup>, and malicious arrest of a ship<sup>5</sup>. Excluding the last of these, a common feature of these situations is the initial ex parte abuse of legal process with arguably immediate and perhaps irreversible damage to the reputation of the victim<sup>6</sup>. Liability for abuse of process is considered to be a distinct tort by some authorities<sup>7</sup>, but it has also been said that it too closely resembles liability for malicious proceedings to be treated separately<sup>8</sup>.

The proceedings referred to in this context are proceedings in due form of law; if the proceedings complained of were wholly void or illegal a claim of trespass will lie for an interference with person or property under cover of them, and malice need not be alleged or proved<sup>9</sup>.

The tort of malicious proceedings does not extend to disciplinary proceedings<sup>10</sup>.

1 *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 428, [2000] 1 All ER 560 at 565, HL, per Lord Steyn. See also *Metall und Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 471, [1989] 3 All ER 14 at 51-52, CA, per Slade LJ. In *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 432-433, [2000] 1 All ER 560 at 570-571, HL, Lord Steyn doubted the desirability of extending the tort of malicious proceedings to civil legal proceedings generally. As to claims for malicious prosecution see PARA 627 et seq.

2 See PARAS 662-663.

3 See PARAS 664-665.

4 See PARA 666.

5 See PARAS 667-668.

6 *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 427, [2000] 1 All ER 560 at 566, HL, per Lord Steyn. In the case of malicious arrest of a ship, the loss is merely financial: *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 427, [2000] 1 All ER 560 at 566, HL. As to the requirement that damage be proved see *Savile v Roberts* (1698) 1 Ld Raym 374 at 378 per Holt CJ; *Barker v Braham and Norwood* (1773) 3 Wils 368; *Bates v Pilling* (1826) 6 B & C 38; *Clissold v Cratchley* [1910] 2 KB 244, CA. See further **CIVIL PROCEDURE**.

7 See PARA 670.

8 *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 427, [2000] 1 All ER 560 at 565, HL, per Lord Steyn.

9 *Barker v Braham and Norwood* (1773) 3 Wils 368; *Bates v Pilling* (1826) 6 B & C 38; *Clissold v Cratchley* [1910] 2 KB 244, CA. See further **CIVIL PROCEDURE**.

10 *Gregory v Portsmouth City Council* [2000] 1 AC 419, [2000] 1 All ER 560, HL.

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## 660. Preliminary steps prior to issue of process.

It is not an abuse of process for a solicitor to send a letter threatening legal proceedings before process has been issued and when to do so was legitimate for asserting the rights of his client<sup>1</sup>.

<sup>1</sup> *Pitman Training Ltd v Nominet UK* [1997] FSR 797 at 809-811, [1998] ITCLR 11 at 21-23 per Sir Richard Scott V-C. Cf *Grainger v Hill* (1838) 4 Bing NC 212, (proceedings effectively begun). A landlord who maliciously served a notice to quit on a tenant in circumstances which amounted to contempt of court committed no tort: *Chapman v Honig* [1963] 2 QB 502, [1963] 2 All ER 513, CA.

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## 661. Proof of damage.

The rule that proof of damage, unless damage is implied by law, is essential to a cause of action<sup>1</sup> applies in actions based on malicious abuse of civil proceedings<sup>2</sup>. Broadly, the bringing of an ordinary civil claim, although brought maliciously and without reasonable and probable cause, will not support a claim by the person sued against the claimant for maliciously bringing the first action<sup>3</sup>. The reason given is that the claim cannot cause legal damage either to reputation, person or property<sup>4</sup>. As regards reputation, damage is not a necessary consequence of civil claims, even where there are scandalous allegations in the pleadings<sup>5</sup>. If the claim is tried the defendant's fair fame will be cleared, should it deserve to be cleared; if the claim is not tried his fair fame is not assailed<sup>6</sup>. As to the second head of damage, no civil claim will result in damage to the person, in the sense of loss of life, limb or liberty<sup>7</sup>. As regards damage to property, the court in the original claim will by its judgment give the defendant such costs as he is entitled to<sup>8</sup>. In practice, therefore, malicious institution of proceedings in tort or for breach of contract is not actionable<sup>9</sup>. The abuses of proceedings in respect of which the law acknowledges that damages can be recovered are malicious institution of bankruptcy or winding-up proceedings<sup>10</sup>, malicious arrest<sup>11</sup>, malicious execution<sup>12</sup>, and malicious arrest of a ship<sup>13</sup>.

<sup>1</sup> As to this rule, which applies to actions for malicious abuse of proceedings because they are in the nature of actions on the case, see **DAMAGES** vol 12(1) (Reissue) PARAS 805, 812.

<sup>2</sup> *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 688-689, CA, per Bowen LJ. There are some cases in which damage is necessarily involved, eg where a petition is maliciously presented to wind up a company (at least a trading company), for the presentation of such a petition must injure the credit of the company (*Quartz Hill Gold Consolidated Mining Co v Eyre* (1883) 11 QBD 674 at 691-693, CA), or where the proceedings affect or endanger a person's liberty (*Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 683, CA, per Brett MR, and at 689 per Bowen LJ, citing *Savile v Roberts* (1698) 1 Ld Raym 374 at 378), or where the proceedings result in the detention of goods (*The Walter D Wallet* [1893] P 202 at 207 per Sir Francis H Jeune P, applying *Chandler v Doulton* (1865) 3 H & C 553 (excessive distress)). See also *The St Clair (Owners) v The Audny (Owners)* 1922 SC 85 (excessive bail for ship).

<sup>3</sup> *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 689-690, CA, per Bowen LJ. Early cases, however, appear to favour the right to bring such a claim where damage could be proved: see *Waterer v Freeman* (1617) Hob 205 at 266-267 per Hobart CJ. In *Savile v Roberts* (1698) 1 Ld Raym 374, relied on by the court in *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, CA, it was held that if one person fancies he has a right against another he may bring a civil claim; but if the claim is one of mere vexation, the person sued cannot bring a claim for damages merely because the first claim was brought maliciously, since he must prove some special damage, eg that he was held to excessive bail. As to these two cases see *Wren v Weild* (1869) LR 4 QB 730 at 736 per Blackburn J. See also *Atwood v Monger* (1653) Sty 378.

4 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 689-690, CA, per Bowen LJ. As to the requirement for damage to be to reputation, person or property see *Savile v Roberts* (1698) 1 Ld Raym 374; and PARA 644 text and note 1.

5 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 689, CA, per Bowen LJ.

6 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 689-690, CA, per Bowen LJ. The passage in the judgment of Bowen LJ upon which the statement in the text is based was not necessary for the decision of the case, and it is submitted that, so far as it relates to a man's fame, it is not universally applicable. Serious damage might be caused to a person by the publication in interlocutory proceedings, or in the course of a long trial, of injurious allegations which he would have no immediate opportunity of contradicting.

7 See *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 690, CA, per Bowen LJ.

8 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 690, CA, per Bowen LJ. The extra costs that the successful party is left to pay after recovery of party and party costs from the loser are not recoverable damage because they are deemed not to be caused by the unjust litigation: *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 682-683, CA, per Brett MR. The only costs which are acknowledged for the purpose of a claim for malicious institution of proceedings are the costs allowed in the original claim, although there is judicial recognition of the fact that the award of costs in a civil claim is not adequate compensation for the costs actually incurred: see *Berry v British Transport Commission* [1962] 1 QB 306, [1961] 3 All ER 65, CA (costs in criminal and civil proceedings distinguished and full criminal outgoings awarded since there is no presumption that a successful party in criminal proceedings will be awarded costs).

9 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 688-690, CA, per Bowen LJ.

10 See PARAS 662-663.

11 See PARAS 664-665.

12 See PARAS 666.

13 See PARAS 667-668.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/662. Malicious institution of bankruptcy or winding-up proceedings.

## **662. Malicious institution of bankruptcy or winding-up proceedings.**

A claim may be brought in respect of damage caused by maliciously<sup>1</sup> and without reasonable and probable cause<sup>2</sup> commencing bankruptcy proceedings against an individual or winding-up proceedings against a company provided that the proceedings terminated favourably to the claimant<sup>3</sup>.

If, by false evidence, a person maliciously and without reasonable and probable cause procures an adjudication in bankruptcy, it will be no answer to a claim for damages brought after annulment that, even if the evidence were true, an adjudication could not have been properly made<sup>4</sup>.

1 Malice, which is a question of fact, may be inferred from the absence of reasonable and probable cause: *Mitchell v Jenkins* (1833) 5 B & Ad 588; and see PARA 648. There was evidence of malice where the proceedings were taken, not to procure equal distribution of the debtor's assets, but to coerce him into the admission of a debt: *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 355. Cf *Partizan Ltd v OJ Kilkenny & Co Ltd* [1998] 1 BCLC 157, [1998] BCC 912 (malice not proved). There will be strong, if not conclusive, evidence of malice where the bankruptcy proceedings were an abuse of the process of the court, or were taken for the purpose of extortion, or of putting an improper pressure on the debtor, eg where the object was to stay an action against a third person (*Re Kemp, ex p Kemp* (1841) 1 Mont D & De G 657), or, in violation of good faith, to put an end to a valuable lease (*Re Gallimore, ex p Gallimore* (1816) 2 Rose 424), or to dissolve a partnership between the petitioning creditor and the debtor (*Re Browne, ex p Browne* (1810) 1 Rose 151; *Re Christie, ex p*

*Saunders* (1833) Mont & B 329; *Re Johnson, ex p Johnson* (1842) 2 Mont D & De G 678; *Re Coulson and Phipps, ex p Phipps* (1844) 3 Mont D & De G 505), or where, there being no assets, the sole object was to defeat an action (*Re Bourne, ex p Bourne* (1826) 2 Gl & J 137). See also *Re Davis, ex p King* (1876) 3 ChD 461, CA, where a petition presented for the purpose of extorting money from the debtor was dismissed; *Re Adams, ex p Griffin* (1879) 12 ChD 480, CA, where the petitioner purchased a debt so as to obtain an adjudication for a fraudulent purpose. However, it seems that the existence of a mere bye motive, not affected with fraud, will not render bankruptcy proceedings an abuse of the process of the court. Thus proceedings were not avoided where the object of the petitioning creditor was to get the bankrupt out of a firm with which the petitioner had extensive dealings, there being no fraud on the part of the petitioner or concert with the other partners: *Re Wilbeam, ex p Wilbeam* (1820) Buck 459, sub nom *Re Wilbran, ex p Wilbran* 5 Madd 1 (approved in *King v Henderson* [1898] AC 720, PC). See also *Re Christie, ex p Saunders* (1833) Mont & B 329 at 351; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 186.

2 *Whitworth v Hall* (1831) 2 B & Ad 695, approved in *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210, HL. As to evidence of want of reasonable and probable cause see PARAS 652-655. See also *Cotton v James* (1830) 1 B & Ad 128; *Hay v Weakley* (1832) 5 C & P 361 (annulment of adjudication not sufficient evidence); *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 351-353 per Cleasby B; *Cox v English, Scottish and Australian Bank* [1905] AC 168, PC; *Partizan Ltd v OJ Kilkenny & Co Ltd* [1998] 1 BCLC 157, [1998] BCC 912 (absence of reasonable and probable cause not proved).

3 *Whitworth v Hall* (1831) 2 B & Ad 695; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 344 per Cleasby B; *Metropolitan Bank v Ltd Pooley* (1885) 10 App Cas 210, HL; *Beechey v William Hill (Park Lane) Ltd* [1956] CLY 5442, (1956) Times, 9 February. As to proceedings terminating in favour of the claimant cf PARAS 637-638.

4 *Farley v Danks* (1855) 4 E & B 493; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 at 341 per Cleasby B. See also *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 684, CA, per Brett MR.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/663. Damage suffered as a result of malicious institution of bankruptcy or winding-up proceedings.

### **663. Damage suffered as a result of malicious institution of bankruptcy or winding-up proceedings.**

An action will lie for falsely and maliciously and without reasonable or probable cause presenting a bankruptcy or winding-up petition even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the company<sup>1</sup>.

1 *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, CA. The court treated a winding-up petition as equivalent to a bankruptcy petition for these purposes, noting that the petition was required to be made public before such time as the company could defend itself against the imputations made against it: *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674 at 685, CA, per Brett MR. Cf *Wyatt v Palmer* [1899] 2 QB 106, CA, declining to stop as frivolous and vexatious a claim brought without special damage for the presentation of a malicious and unfounded bankruptcy petition which had been dismissed.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/664. Malicious arrest or detention of a person.

### **664. Malicious arrest or detention of a person.**

A claim may be brought for malicious arrest where a person maliciously and without reasonable and probable cause procures the arrest of a person<sup>1</sup>. The arrest constitutes sufficient damage for this tort<sup>2</sup>. Although no claim lies against a witness for words spoken in giving evidence in

court<sup>3</sup>, the gist of a claim for malicious arrest is that process was instituted as a result of which the court was induced to order the arrest of the claimant, and the claim will not be defeated because the giving of evidence was merely a step in bringing about the arrest<sup>4</sup>. A claim may also be brought for malicious detention of a person<sup>5</sup>.

1 *Daniels v Fielding* (1846) 16 M & W 200; *Ross v Norman* (1850) 5 Exch 359; *Melia v Neate* (1863) 3 F & F 757; *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329; *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729, HL (arrest to compel witness to give evidence). Cf *Revis v Smith* (1856) 18 CB 126. A person who makes default in payment of a sum adjudged to be paid by a conviction or by specified orders of a magistrates' court is liable to be committed to prison: see eg the Magistrates' Courts Act 1980 ss 76, 92; and **MAGISTRATES**. As to debts due to the Crown see further **CIVIL PROCEDURE** vol 12 (2009) PARA 1239. As to the arrest of debtors subject to bankruptcy proceedings see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 221. For an example of a claim for malicious arrest under emergency powers see *Pike v Waldrum and Peninsular and Oriental Steam Navigation Co* [1952] 1 Lloyd's Rep 431.

2 *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729, HL.

3 As to the protection given to witnesses in respect of evidence given in proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARA 978; **LIBEL AND SLANDER** vol 28 (Reissue) PARAS 97-100.

4 See *Roy v Prior* [1971] AC 470 at 479-480, [1970] 2 All ER 729 at 735, HL, per Lord Morris of Borth-y-Gest, and at 480 and 736 per Lord Wilberforce. Thus a solicitor is liable where his evidence in open court on his applying for the warrant of arrest causes the arrest to be made: *Roy v Prior* [1971] AC 470, [1970] 2 All ER 729, HL, which also establishes that the tort may be committed even though a judge's order was necessary for the arrest. Cf *Daniels v Fielding* (1846) 16 M & W 200 at 207 per Rolfe B.

It has been held that it is not essential to produce the warrant in order to prove that an arrest was made: *Crook v Dowling* (1782) 3 Doug KB 75; *Arundell v White* (1811) 14 East 216; *Casburn v Reid* (1818) 2 Moore CP 60; *Petrie v Lamont* (1842) 3 Man & G 702.

5 *Moore v Guardner* (1847) 16 M & W 595, where a debtor was not released after paying the costs he owed and for non-payment of which he was in custody under an attachment.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/665. Arrest of privileged persons.

### 665. Arrest of privileged persons.

A person privileged from arrest by reason of his having been ordered as a witness to attend a court, or by reason of any other court order, cannot, if arrested, recover damages on the strength of the privilege, even though the arrest was made maliciously and with knowledge of the privilege<sup>1</sup>. The privilege is that of the court which made the order<sup>2</sup>, and the remedy is to apply to the court for release and to have the person making the arrest punished for contempt<sup>3</sup>.

1 *Magnay v Burt* (1843) 5 QB 381, where a witness was arrested on returning from an examination order by the court; *Yearsley v Heane* (1845) 14 M & W 322, where a person was arrested after a protection order had been made under the Insolvent Debtors Act 1842 (repealed).

2 *Magnay v Burt* (1843) 5 QB 381. See also *Re Hunt* [1959] 2 QB 69, [1959] 2 All ER 252, CA.

3 *Magnay v Burt* (1843) 5 QB 381; *Yearsley v Heane* (1845) 14 M & W 322. See also *Watson v Carrol* (1839) 4 M & W 592; *Philips v Naylor* (1858) 3 H & N 14 (affd (1859) 4 H & N 565); and **CONTEMPT OF COURT** vol 9(1) (Reissue) PARA 435.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/666. Malicious execution.

### **666. Malicious execution.**

A claim may be brought where a person maliciously and without reasonable and probable cause procures execution to be levied on a person's goods, causing him damage<sup>1</sup>. A claim may be brought if a judgment creditor maliciously takes out execution for the full amount when part of the debt has been paid<sup>2</sup>, or if he refuses a tender of the debt and proceeds to execution<sup>3</sup>. From the nature of the claim, the claimant does not have to prove that the proceedings terminated in his favour<sup>4</sup>.

1 *Churchill v Siggers* (1854) 3 E & B 929 at 937-938 per Lord Campbell. See also PARA 661. If judgment has been improperly obtained it should be set aside and any seizure in pursuance of it will be trespass: see *Bates v Pilling* (1826) 6 B & C 38; *Brown v Jones* (1846) 15 M & W 191.

2 *Churchill v Siggers* (1854) 3 E & B 929.

3 *Gilding v Eyre* (1861) 10 CBNS 592. If a creditor levies execution under a void warrant, or when he is unaware that the debt has been paid, the remedy is in trespass, not malicious execution: *Clissold v Cratchley* [1910] 2 KB 244, CA. See also **CIVIL PROCEDURE** vol 12 (2009) PARA 1375 et seq.

4 *Gilding v Eyre* (1861) 10 CBNS 592.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/667. Maliciously procuring arrest of ship.

### **667. Maliciously procuring arrest of ship.**

A claim may be brought against a person who maliciously and without reasonable and probable cause procures, by means of Admiralty proceedings, the arrest of a ship, if the ship has been released and the proceedings have terminated in favour of the person aggrieved by the arrest<sup>1</sup>. The general rule that the cause of action does not accrue until there has been a prior determination in favour of the claimant does not apply in cases where the action is ancillary to the main proceedings and there is no risk of inconsistent findings or collateral attack<sup>2</sup>.

1 *Castrique v Behrens* (1861) 3 E & E 709; *Redway v McAndrew* (1873) LR 9 QB 74; *The Strathnaver* (1875) 1 App Cas 58 at 67, PC; *The Collingrove*, *The Numida* (1885) 10 PD 158; *The Walter D Wallet* [1893] P 202. The sentence in the text was considered in *Congentra AG v Sixteen Thirteen Marine SA*, *The Nicholas M* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479, [2008] 2 Lloyd's Rep 602 at [35]-[44] per Flaux J. As to proceedings terminating in favour of the claimant cf PARAS 637-638. As to the practice in Admiralty see **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 157 et seq.

2 *Congentra AG v Sixteen Thirteen Marine SA*, *The Nicholas M* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479, [2008] 2 Lloyd's Rep 602, citing *Gilding v Eyre* (1861) 10 CBNS 592 as an example. See also PARA 666.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iii) Malicious Civil Proceedings/668. Damage suffered as a result of malicious arrest of a ship.

### 668. Damage suffered as a result of malicious arrest of a ship.

In a claim for the malicious arrest of a ship, no actual or special damage need be proved; the claimant, if he succeeds, is entitled to at least nominal damages<sup>1</sup>.

Where actual damage has been sustained, the Admiralty Court will not, if the facts are properly brought to its knowledge, which may be done by affidavit<sup>2</sup>, put the injured party to the necessity of bringing a fresh claim, but will, in the original claim, award him damages for the wrongful arrest<sup>3</sup>, usually in the nature of demurrage<sup>4</sup>.

1 *The Walter D Wallet* [1893] P 202. At least nominal damages must be awarded for the detention of the ship. The reasoning of this case seems relevant for the detention of any property, not merely ships. Where the defendant caused the claimant's ship to be wrongfully arrested in breach of contract by the defendant, and the claimant incurred bank interest charges in providing a bank guarantee for the purpose of releasing the ship, those interest charges were not a foreseeable consequence of the wrongful arrest and so were not recoverable damages: *Compania Financiera Soleada SA v Hamoor Tanker Corpn Inc, The Borag* [1981] 1 All ER 856, [1981] 1 WLR 274, CA.

2 *The Collingrove, The Numida* (1885) 10 PD 158 at 161 per Sir James Hannen P.

3 *The Evangelismos* (1858) 12 Moo PCC 352 at 359, PC, approved in *The Strathnaver* (1875) 1 App Cas 58, PC; *The Collingrove, The Numida* (1885) 10 PD 158 at 160 per Sir James Hannen P, following *The Orion* (1852) 12 Moo PCC 356n. See also *The Nautilus* (1856) Sw 105; *The Glasgow (otherwise The Ya Macraw)* (1856) Sw 145, where the element of malice seems to have been wanting. From the language of the court in *The Collingrove, The Numida* (1885) 10 PD 158 at 161, it might be inferred that to entitle the owner of a ship to damages for her arrest without cause it is enough to show something less than malice, namely 'that it was the result of gross negligence', but a reference to the authority on which this language is founded shows that the negligence must be that crassa negligentia from which the law implies malice: *The Evangelismos* (1858) 12 Moo PCC 352, PC.

4 *The Orion* (1852) 12 Moo PCC 356n; *The Nautilus* (1856) Sw 105; *The Glasgow (otherwise The Ya Macraw)* (1856) Sw 145. See **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 161 et seq.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(iv) Improper Registration of Judgments/669. When the claim may be brought.

### (iv) Improper Registration of Judgments

#### 669. When the claim may be brought.

The improper registration<sup>1</sup> of a judgment or order for the payment of money, by which the party against whom it has been obtained is prejudiced in disposing of his land, is not actionable without proof of malice and want of reasonable and probable cause<sup>2</sup>.

1 See **LAND CHARGES** vol 26 (2004 Reissue) PARA 654.

2 *Gibbs v Pike* (1842) 9 M & W 351.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(1) WRONGFUL USE OF PROCESS/(v) Abuse of Process/670. When the claim lies.

### (v) Abuse of Process

## 670. When the claim lies.

It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and, as a result, to cause damage<sup>1</sup>. The claimant need not prove want of reasonable and probable cause, nor need the proceedings have terminated in his favour<sup>2</sup>. He must show that the defendant has used the proceedings for some improper purpose<sup>3</sup>. Proper process may become wrongful if unduly and unnecessarily repeated<sup>4</sup>. It has been said that liability for malicious abuse of process too closely resembles liability for malicious proceedings to be treated separately<sup>5</sup>.

1 *Grainger v Hill* (1838) 4 Bing NC 212, where the defendant was held liable when he had the plaintiff arrested, ostensibly for non-payment of a debt, but in fact in order illegally to compel him to surrender the register of a vessel without which the plaintiff could not take the vessel out to sea. See also *Parton v Hill* (1846) 10 LT 414; *Churchill v Siggers* (1854) 3 E & B 929 at 937 per Lord Campbell; *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566 at 574, [1977] 1 WLR 478 at 489, CA, per Lord Denning MR (dissenting), at 582 and 498-499 per Scarman LJ, and at 585 and 503 per Bridge LJ; *Re Marjory, a Debtor (No 757 of 1954)* [1955] Ch 600 at 623, [1955] 2 All ER 65 at 78, CA, per Lord Evershed MR. It seems that the claimant need not be a party to the abusive proceedings, and collusive proceedings involving others but designed to harm him may ground a claim: *Smith v Tunstall* (1687) Carth 3.

2 *Grainger v Hill* (1838) 4 Bing NC 212. See also *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91, [1985] 1 WLR 1327, CA. In *Smith v East Elloe RDC* [1956] AC 736, [1956] 1 All ER 855, HL, it was held that there was jurisdiction to hear a claim that a clerk of the council knowingly and in bad faith wrongfully procured a compulsory purchase order to be made and confirmed by a minister, even though a statute precluded the plaintiff from challenging the validity of the order itself on the grounds of bad faith.

3 *Clissold v Cratchley* [1910] 2 KB 244, CA. Therefore, a defendant who by mistake issues civil process note for a debt which has already been paid is not liable: *Corbett v Burge, Warren and Ridgley Ltd* (1932) 48 TLR 626.

4 *Heywood v Collinge* (1838) 9 Ad & El 268 at 273-274 per Lord Denman CJ. If a person habitually, persistently and unreasonably institutes vexatious legal proceedings then, on application by the Attorney General, the High Court may direct that no legal proceedings be commenced or continued in any court without leave of the High Court: see the Senior Courts Act 1981 s 42 (amended by the Prosecution of Offences Act 1985 s 24); and **CIVIL PROCEDURE** vol 11 (2009) PARA 258. As to the renaming of the Senior Courts Act 1981 see PARA 470 note 2. A court may not discharge the order but there may be an appeal to the Court of Appeal, limited to whether the order should have been made in the first place: *Rohrberg v Charkin* [1985] NLJ Rep 185, CA. The High Court has an inherent jurisdiction to prevent the institution of civil proceedings which are likely to constitute an abuse of the process of the court: *Ebert v Venvil, Ebert v Birch* [2000] Ch 484, [1999] 3 WLR 670, CA. An order made in the High Court prohibiting commencement of proceedings without leave may also extend to proceedings in the county court, but the county court should not purport to bind the High Court: *Ebert v Venvil, Ebert Birch* [2000] Ch 484, [1999] 3 WLR 670, CA. See also *Grepe v Loam* (1887) 37 ChD 168, CA; *Landi Den Hartog BV v Sea Bird (Clean Air Fuel Systems) Ltd* [1976] FSR 489; *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2004] 1 WLR 88.

5 *Gregory v Portsmouth City Council* [2000] 1 AC 419 at 427, [2000] 1 All ER 560 at 565, HL, per Lord Steyn.

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### (vi) Perjury

#### 671. Perjury.

A claimant who is imprisoned in consequence of false evidence given by the defendant on oath at the claimant's trial has no cause of action; perjury is a crime but not a tort<sup>1</sup>.



1 *Hargreaves v Bretherton* [1959] 1 QB 45, [1958] 3 All ER 122, approved obiter in *Roy v Prior* [1971] AC 470 at 477, [1970] 2 All ER 729 at 733, HL, per Lord Morris of Borth-y-Gest. The Court of Appeal held in *Marrinan v Vibart* [1963] 1 QB 528, [1962] 3 All ER 380 that the rule is not circumvented by alleging a conspiracy between witnesses to make false statements, but this may now be open to reconsideration in the light of the decision of the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174, [2008] 2 All ER 413 (criminal offence not involving commission of a tort sufficient to make out conspiracy to injure by unlawful means). See also PARA 625. As to the immunity of witnesses in tort, even for statements made before prosecution if made for the purpose of a possible prosecution, see *Evans v London Hospital Medical College* [1981] 1 All ER 715, [1981] 1 WLR 184; *Taylor v Serious Fraud Office* [1999] 2 AC 177, [1998] 4 All ER 801, HL; *Westcott v Westcott* [2008] EWCA Civ 818, [2009] QB 407, [2009] 1 All ER 727. As to perjury see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 712.

Halsbury's Laws of England/TORT (VOLUME 97 (2010) 5TH EDITION)/4. TORTS IN SPECIFIC CONTEXTS/(2) TORT AND EMPLOYMENT/(i) Employer's Liabilities to Employee/A. LIABILITIES AT COMMON LAW/672. Employer's common law duty.

## **(2) TORT AND EMPLOYMENT**

### **(i) Employer's Liabilities to Employee**

#### **A. LIABILITIES AT COMMON LAW**

##### **672. Employer's common law duty.**

The common law has from early times imposed a duty on an employer to take reasonable care to see that his employees, jointly engaged with him in carrying on his work or industry, do not suffer injury in consequence of his personal negligence, including his failure properly to superintend and control the undertaking in which he and they are mutually engaged<sup>1</sup>.

A breach of this duty causing personal injury has always given the employee a right of action. For his own personal negligence an employer was always, and still is, liable at common law<sup>2</sup>. A liability for personal negligence may arise not only where the employer actually takes part in the work himself<sup>3</sup> but also where, whether through his own acts and omissions or those of his agent, he fails to discharge his non-delegable duty of care to employees<sup>4</sup>. Alternatively the employer may be vicariously liable for the breach of duty of his employees<sup>5</sup>.

1 See *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628, HL. The duty is also an implied term in the contract of employment, so that an action for breach of the duty can be brought either in contract or in tort: see *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57, [1959] 2 All ER 345, CA. For the employer's duty as to the safety of employment see **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 412 et seq.

2 *Thomas v Quartermaine* (1887) 18 QBD 685 at 691, CA, per Bowen LJ. Claims are frequently brought in which damages are claimed first at common law and secondly for breach of statutory duty: see eg *Bath v British Transport Commission* [1954] 2 All ER 542, [1954] 1 WLR 1013, CA. As to negligence in general see **NEGLIGENCE**.

3 *Ashworth v Stanwix* (1861) 3 E & E 701.

4 See PARA 705.

5 See PARA 680. As to the employer's right to recover an indemnity from the employee for whose fault he has been made vicariously liable see **EMPLOYMENT** vol 39 (2009) PARA 39.

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### **673. Abolition of common employment: avoidance of contracting out.**

The doctrine of common employment<sup>1</sup> was that if the person occasioning and the person suffering an injury were fellow employees engaged in a common employment for and under the same employer, the employer, where he had taken reasonable care to select proper and competent employees, was not liable at common law for the consequences of the injury<sup>2</sup>. This doctrine is no longer a defence<sup>3</sup>.

Moreover any provision contained in a contract of employment or apprenticeship or any collateral agreement is void in so far as it would have the effect of excluding or limiting the employer's liability in respect of personal injuries<sup>4</sup> caused to the person employed or apprenticed by the negligence of persons in common employment with him<sup>5</sup>.

1 See the judgment of Abinger CB in *Priestley v Fowler* (1837) 3 M & W 1. The doctrine was established in the law of Scotland in *Bartonhill Coal Co v Reid* (1858) 3 Macq 266, HL, and *Bartonhill Coal Co v Maguire* (1858) 3 Macq 300, HL. See also *Graham (or Miller) v Glasgow Corpn* [1947] AC 368 at 372, [1947] 1 All ER 1 at 2-3, HL, per Viscount Simon. The last reported case before the House of Lords on the doctrine was *Glasgow Corpn v Bruce (or Neilson)* [1948] AC 79, [1947] 2 All ER 346, HL.

2 See *Priestley v Fowler* (1837) 3 M & W 1; *Wilson v Merry* (1868) LR 1 Sc & Div 326, HL. See also the cases cited in note 1.

3 See the Law Reform (Personal Injuries) Act 1948 ss 1(1), 3, 6(2). The Act binds the Crown: s 4. The Act was passed to remedy what had come to be regarded as a hardship to the injured employee by making the employer vicariously liable for injuries caused tortiously by a fellow employee: *Lindsay v Charles Connell & Co Ltd* 1951 SC 281, Ct of Sess at 285 per Lord Blades.

4 'Personal injury' includes any disease and any impairment of a person's physical or mental condition, and 'injured' must be construed accordingly: Law Reform (Personal Injuries) Act 1948 s 3.

5 See the Law Reform (Personal Injuries) Act 1948 s 1(3); and *Smith v British European Airways Corpn* [1951] 2 KB 893, [1951] 2 All ER 737 (a rule of a pension scheme void in so far as it excluded such liability). See also the provisions of the Unfair Contract Terms Act 1977 s 2(1), (2), which restrict avoidance of liability for negligence by a contract term. These provisions extend to a contract of employment only in favour of an employee: s 1(2), Sch 1 para 4. See **CONTRACT** vol 9(1) (Reissue) PARAS 819-822.

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### **B. LIABILITY FOR BREACH OF STATUTORY DUTY**

#### **674. Claim for breach of statutory duty.**

Apart from the duty cast upon an employer at common law there is a vast body of statute law imposing duties upon him in relation to the safety of working conditions which carry the sanctions of the criminal law<sup>1</sup>. Breach of a duty imposed by regulations made under the Health and Safety at Work etc Act 1974 is, so far as it causes damage, actionable except in so far as the regulations provide otherwise<sup>2</sup>. An employee may also maintain independently a civil claim in the common law tort of breach of statutory duty if it is shown that the provisions in question were intended to impose, in addition to a public duty, a duty enforceable by a person aggrieved

by the contravention of the provisions<sup>3</sup>, and that the damage or injury suffered by the employee was caused or materially contributed to by the breach<sup>4</sup>.

1 There are provisions relating to eg agriculture, factories, mines and quarries: see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 1246 et seq; **HEALTH AND SAFETY AT WORK; MINES, MINERALS AND QUARRIES**. Statutory regulations do not supersede the employer's common law duties, and the regulations ought not to be expected to cover every kind of danger: *Bux v Slough Metals Ltd* [1974] 1 All ER 262, [1973] 1 WLR 1358, CA. Irrespective of any liability or breach of duty on the part of his employer, an injured employee may be entitled to benefit under the state system of national insurance or of insurance against industrial injuries: see **SOCIAL SECURITY AND PENSIONS**. As to the taking into account of such benefits in assessing damages in a claim for personal injuries see **DAMAGES** vol 12(1) (Reissue) PARAS 903-925.

2 Health and Safety at Work etc Act 1974 s 47(2) (amended by the Employment Protection Act 1975 ss 116, 125(3), Sch 15 para 14, Sch 18). As to the making of health and safety regulations see the Health and Safety at Work etc Act 1974 s 15; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 424. See also PARA 503.

3 The courts have leaned in favour of conferring on employees a right to claim damages for breach of statutory duty imposed on their employers or the occupiers of factories in which they work: see *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243 at 255, [1954] 2 All ER 625 at 631, CA, per Somervell LJ. As to the matters to be considered in construing a statute to ascertain whether a claim may be brought see PARA 498 et seq.

4 As to breach of statutory duty see PARA 495 et seq. As to defences to an action for breach of statutory duty see PARAS 510-515. As to causation see PARAS 508-509; and **DAMAGES** vol 12(1) (Reissue) PARAS 854-857.

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## 675. Defective equipment.

Where an employee<sup>1</sup> suffers personal injury<sup>2</sup> in the course of his employment<sup>3</sup> in consequence of a defect in equipment<sup>4</sup> provided by his employer for the purpose of the employer's business<sup>5</sup> and the defect is attributable wholly or partly to the fault<sup>6</sup> of a third party<sup>7</sup>, the injury is deemed to be also attributable to negligence on the part of the employer<sup>8</sup>. This is without prejudice to the law relating to contributory negligence and to any remedy by way of contribution or in contract or otherwise which is available to the employer in respect of the injury<sup>9</sup>. These provisions bind the Crown<sup>10</sup>. Any agreement is void in so far as it purports to exclude or limit this liability<sup>11</sup>.

1 'Employee' means a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person; and 'employer' is construed accordingly: Employer's Liability (Defective Equipment) Act 1969 s 1(3). The Employers' Liability (Compulsory Insurance) Act 1969 requires employers to insure against this liability (see **INSURANCE** vol 25 (2003 Reissue) PARA 685), but directors of an insolvent company which failed to insure have been held not personally liable: *Richardson v Pitt-Stanley* [1995] QB 123, [1995] 1 All ER 460, CA.

2 'Personal injury' includes loss of life, any impairment of a person's physical or mental condition and any disease: Employer's Liability (Defective Equipment) Act 1969 s 1(3). The Act only applies to injuries suffered after its commencement (ie 25 October 1969): ss 1(1), 2(2).

3 As to the liability of an employer depending on the employee having acted 'in the course of his employment' see PARA 693.

4 'Equipment' includes any plant and machinery, vehicle, aircraft and clothing: Employer's Liability (Defective Equipment) Act 1969 s 1(3). For these purposes, 'equipment' includes a ship, even though ships are not mentioned in the clarifying definition in s 1(3): *Coltman v Bibby Tankers Ltd, The Derbyshire* [1988] AC 276, [1987] 3 All ER 1068, HL. See also *Knowles v Liverpool City Council* [1993] 4 All ER 321, [1993] 1 WLR 1428, HL (equipment includes material (on the facts, a paving stone) on which the employee is working).

5 'Business' includes the activities carried on by any public body: Employer's Liability (Defective Equipment) Act 1969 s 1(3).

6 'Fault' means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort: Employer's Liability (Defective Equipment) Act 1969 s 1(3).

7 It is immaterial whether the third party is identified or not: Employer's Liability (Defective Equipment) Act 1969 s 1(1)(b).

8 Employer's Liability (Defective Equipment) Act 1969 s 1(1). It is immaterial whether or not the employer is otherwise liable in respect of the injury: s 1(1).

9 Employer's Liability (Defective Equipment) Act 1969 s 1(1). See also *James v Durkin (Civil Engineering Contractors)* (1983) Times, 25 May.

10 Employer's Liability (Defective Equipment) Act 1969 s 1(4). For these purposes, persons in the service of the Crown are treated as employees of the Crown: s 1(4).

11 Employer's Liability (Defective Equipment) Act 1969 s 1(2).

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## C. DEFENCES

### 676. Volenti non fit injuria.

The defence of volenti non fit injuria is available to an employer as it is to any other defendant sued in tort<sup>1</sup>, but for the defence to succeed it must be shown not only that the employee fully understood and appreciated the risk and danger of the work, but also that in carrying it out he acted as a volunteer in the strictest sense. In practice, therefore, the defence rarely succeeds where the employee is going about his usual work<sup>2</sup>.

The principle volenti non fit injuria is not generally a defence to a claim for breach of a statutory duty intended to protect the employee<sup>3</sup>, but the defence may be applicable where the employer is not personally in breach of the statute<sup>4</sup>.

1 As to the defence of volenti non fit injuria see PARA 465; and **NEGLIGENCE**.

2 See *Bowater v Rowley Regis Corp* [1944] KB 476, [1944] 1 All ER 465, CA, where the defence was held inapplicable in a case where a carter under protest drove a horse known to be unsafe which injured him. See also *Clarke v Holmes* (1862) 7 H & N 937; *Yarmouth v France* (1887) 19 QBD 647, DC; *Smith v Baker & Sons* [1891] AC 325, HL (where Lord Herschell, at 366, criticised the Court of Appeal's application of the defence in *Thomas v Quartermaine* (1887) 18 QBD 685, CA); *Monaghan v WH Rhodes & Son* [1920] 1 KB 487; *Baker v James* [1921] 2 KB 674; *D'Urso v Sanson* [1939] 4 All ER 26; *Hyett v Great Western Rly Co* [1948] 1 KB 345, [1947] 2 All ER 264; *Merrington v Ironbridge Metal Works Ltd* [1952] 2 All ER 1101, 117 JP 23; *Weir v Andrew Barclay & Co Ltd* 1955 SLT (Notes) 56, Ct of Sess; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110, HL (a workman is not expected to initiate safety measures, and his continued work in an established dangerous system does not afford the employer a defence). The defence was applicable in *Taylor v Sims* [1942] 2 All ER 375; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999, HL; *O'Reilly v National Rail and Tramway Appliances Ltd* [1966] 1 All ER 499 (obiter).

3 *Baddeley v Earl Granville* (1887) 19 QBD 423, DC; *Davies v Thomas Owen & Co* [1919] 2 KB 39; *Wheeler v New Merton Board Mills Ltd* [1933] 2 KB 669, CA; *Alford v National Coal Board* [1952] 1 All ER 754 at 757, HL, per Lord Normand. See also PARA 513.

4 See *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, [1964] 2 All ER 999, HL (employees in breach of statutory duty laid on them personally being volens could not hold employers liable for fellow workers' breaches). See also *Hugh v National Coal Board* 1972 SC 252, Ct of Sess.

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### **677. Contributory negligence.**

Even if an employee succeeds in establishing that his employer's breach of duty was a cause of his injuries, he may nevertheless be guilty of contributory negligence if there has been an act or omission on his part, amounting to want of reasonable care for his own safety, which has caused or contributed to the damage of which he complains<sup>1</sup>.

Where the breach of duty on the part of the employer and the employee's own negligence are found to be material causes of the employee's injury, responsibility will be apportioned<sup>2</sup> between them<sup>3</sup> upon general principles which are dealt with elsewhere in this work<sup>4</sup>.

1 As to contributory negligence generally see PARA 512; and **NEGLIGENCE**. As to the test for determining who is responsible for an accident see eg *Stapley v Gypsum Mines Ltd* [1953] AC 663 at 681, [1953] 2 All ER 478 at 485-486, HL, per Lord Reid. It was said in *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1934] 2 KB 132 at 140 per Lawrence J (at first instance in an action against an employer for breach of statutory duty) that an employee ought not to be held guilty of contributory negligence for every risky thing which he may do in his familiarity with the machine upon which he is working. This statement was approved in the same case in the House of Lords (see [1936] AC 206 at 214, HL, per Lord Wright), and in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 166, [1939] 3 All ER 722 at 731, HL, per Lord Atkin, and at 175 and 737 per Lord Wright; see also *Stringer v Automatic Woodturning Co Ltd* [1956] 1 All ER 327 at 332, 336, CA (action for breach of statutory duty). It has, however, been doubted how far the principle stated by Lawrence J in *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1934] 2 KB 132 applies in the case of an ordinary common law claim where there is no evidence of employees performing repetitive work under strain or for long hours at dangerous machines: see *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627 at 642, 647, [1956] 1 All ER 403 at 408, 413, HL. Failure to ask for something which the employer is under a duty to provide may constitute contributory negligence: see *Clifford v Charles H Challen & Son Ltd* [1951] 1 KB 495, [1951] 1 All ER 72, CA. The mere fact that an employee suffered injury while trespassing on his employer's property does not make him guilty of contributory negligence: *Westwood v Post Office* [1974] AC 1, [1973] 3 All ER 184, HL.

2 Under the Law Reform (Contributory Negligence) Act 1945 s 1: see **DAMAGES** vol 12(1) (Reissue) PARA 876; **NEGLIGENCE**.

3 See eg *Stapley v Gypsum Mines Ltd* [1953] AC 663, [1953] 2 All ER 478, HL (failure to fetch down insecure roof in mine; employee 80% to blame); *National Coal Board v England* [1954] AC 403, [1954] 1 All ER 546, HL (negligent shot-firing; employee 25% to blame); *Williams v Sykes and Harrison Ltd* [1955] 3 All ER 225, [1955] 1 WLR 1180, CA (unfenced machinery, employee 80% to blame); *Hodkinson v Henry Wallwork & Co Ltd* [1955] 3 All ER 236, [1955] 1 WLR 1195, CA (unfenced transmission machinery, employee 90% to blame). In all these cases the apportionment of the trial judge was altered on appeal. Normally an appellate court is loath to interfere with the discretion exercised by the trial judge (*National Coal Board v England* [1954] AC 403 at 427, [1954] 1 All ER 546, at 557, HL, per Lord Reid, and at 427-428 and 557 per Lord Tucker).

4 See **DAMAGES** vol 12(1) (Reissue) PARAS 876-877; **NEGLIGENCE**.

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## **D. CLAIMS IN RESPECT OF DEATH**

### **678. Survival of claim for breach of duty.**

A claim by an employee against his employer for breach of duty may survive the employee's death, since causes of action subsisting in him at his death survive for the benefit of his estate<sup>1</sup>.

The damages recoverable include damages for medical expenses and pain and suffering undergone by the deceased before his death<sup>2</sup>, but they do not extend to any loss to the deceased's estate in consequence of his death<sup>3</sup>.

1 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1); and **EXECUTORS AND ADMINISTRATORS**. Claims for defamation do not survive (see s 1(1) proviso (amended by the Law Reform (Miscellaneous Provisions) Act 1970 s 7, Schedule; and the Administration of Justice Act 1982 ss 4(2), 75, Sch 9 P I)), nor do claims for exemplary damages (see the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(a)(i) (substituted by the Administration of Justice Act 1982 ss 4(2), 73(3), (4))), nor claims under the Fatal Accidents Act 1976 s 1A (see PARA 488; and **NEGLIGENCE**) for bereavement damages (see the Law Reform (Miscellaneous Provisions) Act 1934 s 1(1A) (added by the Administration of Justice Act 1982 ss 4(1), 73(1))).

2 *Rose v Ford* [1936] 1 KB 90, CA; on appeal [1937] AC 826, [1937] 3 All ER 359, HL (where the decision that damages for pain and suffering were recoverable was in effect upheld in the House of Lords).

3 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(2)(c). A sum for funeral expenses may, however, be included: see s 1(2)(c). See further **EXECUTORS AND ADMINISTRATORS**.

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#### **679. Claim for benefit of dependants.**

A claim in respect of a wrongful act, neglect or default causing an employee's death may be brought by his personal representatives, as in the case of any other person whose death is so caused, for the benefit of his dependants<sup>1</sup>. This right is additional to the rights conferred by the survival of the cause of action previously mentioned<sup>2</sup>.

1 See the Fatal Accidents Act 1976; PARA 488; and **DAMAGES** vol 12(1) (Reissue) PARAS 932-939; **NEGLIGENCE**.

2 See the Law Reform (Miscellaneous Provisions) Act 1934 s 1(5) (amended by the Carriage by Air Act 1961 s 14(3), Sch 2); and **EXECUTORS AND ADMINISTRATORS**. As to the survival of the cause of action see PARA 678.

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### **(ii) Employer's Vicarious Liability**

#### **A. GENERAL PRINCIPLES**

##### **680. In general.**

Independently of personal fault, an employer<sup>1</sup> will be vicariously liable for a tort<sup>2</sup> committed by an employee<sup>3</sup> in the course of employment<sup>4</sup>.

1 As to the specific position of corporations, public authorities, trustees and the Crown see PARA 698 et seq.

2 See PARA 681 et seq.

3 See PARA 686 et seq. As to the employer's liability for torts committed by another person's employee whom he has temporarily hired see PARA 711 et seq. As to the employer's liability as principal for torts committed by an agent see PARA 702 et seq. As to the employer's liability for torts committed by an independent contractor in those exceptional circumstances where a personal and non-delegable duty arises see PARA 705 et seq.

4 See PARA 690 et seq.

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## **B. COMMISSION OF A TORT BY THE EMPLOYEE**

### **681. Employee's tort.**

To render an employer vicariously liable it is necessary to prove that his employee has been guilty of a tort towards the person injured<sup>1</sup>. The employer is not responsible where the injury is occasioned without the commission of a tort<sup>2</sup>. Where, although his employee has been negligent, one of the causes of the injury is contributory negligence of the person injured, liability will be apportioned<sup>3</sup>.

1 *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] 4 All ER 395 at [15] per Lord Nicholls of Birkenhead, rejecting the 'employer's tort' theory whereby it is only the employee's acts, and not his torts, that are attributed to the employer. See also *Crédit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [2000] 1 AC 486, [1999] 1 All ER 929, HL (all the elements of a tort must occur within the course of employment; the employer is not liable if what is done within the course of employment is not a complete tort and completion by the employee would lie outside the course of employment, even if what is done in the course of employment would assist a third party to commit a tort); *Armstrong v Strain* [1952] 1 KB 232, [1952] 1 All ER 139, CA; *Esso Petroleum Co Ltd v Southport Corp'n* [1956] AC 218, [1955] 3 All ER 864, HL; *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627 at 639, [1956] 1 All ER 403 at 406, HL, per Lord Morton of Henryton. The employer's vicarious liability, if any, is of course distinct from his liability for any personal breach of duty by him arising out of the same facts: *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627 at 639, [1956] 1 All ER 403 at 406, HL, per Lord Morton of Henryton. See also *Port Swettenham Authority v TW Wu & Co* [1979] AC 580, [1978] 3 All ER 337, PC.

2 *Aston v Heaven* (1797) 2 Esp 533; *Christie v Griggs* (1809) 2 Camp 79; *Crofts v Waterhouse* (1825) 3 Bing 319; *Holmes v Mather* (1875) LR 10 Exch 261.

3 See under the Law Reform (Contributory Negligence) Act 1945 s 1: see **DAMAGES** vol 12(1) (Reissue) PARA 876; **NEGLIGENCE** vol 78 (2010) PARA 75 et seq.

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### **682. Nature of the tort immaterial.**

For the purposes of establishing vicarious liability, the nature of the tort committed by the employee is immaterial and the employer is liable whether the tort is an assault<sup>1</sup>, a false imprisonment<sup>2</sup>, a conversion<sup>3</sup>, a trespass to land<sup>4</sup>, an infringement of a patent or trade mark<sup>5</sup>, a nuisance<sup>6</sup> or a breach of statutory duty<sup>7</sup>. An employer, including a corporation<sup>8</sup>, is liable even where the tort involves malice or guilty knowledge, as, for instance, in the case of malicious

prosecution<sup>9</sup>, libel or slander<sup>10</sup> or fraud<sup>11</sup>. It must, however, be proved in every case that the conduct in question was within the scope of the employee's authority or employment<sup>12</sup>.

1 *Seymour v Greenwood* (1861) 7 H & N 355, Ex Ch; *Eastern Counties Rly Co v Broom* (1851) 6 Exch 314 (corporation); *Bayley v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 CP 148, Ex Ch (corporation); *Dyer v Munday* [1895] 1 QB 742, CA. See also PARA 697. The employer is not liable if the assault was an act of private vengeance on the part of the employee, not committed in the course of, or otherwise closely connected with, his employment: *Warren v Henlys Ltd* [1948] 2 All ER 935; cf *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887, [2004] 4 All ER 85, [2003] 1 WLR 2158; *Gravil v Carroll* [2008] EWCA Civ 689, [2008] ICR 1222, [2008] IRLR 829. As to the course of employment see PARA 692. As to actions for assault see PARA 526 et seq.

2 *Goff v Great Northern Rly Co* (1861) 3 E & E 672; *Walker v South Eastern Rly Co*, *Smith v South Eastern Rly Co* (1870) LR 5 CP 640; *Moore v Metropolitan Rly Co* (1872) LR 8 QB 36.

3 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Jones v Hart* (1698) 2 Salk 441; *Yarborough v Bank of England* (1812) 16 East 6 (corporation); *Giles v Taff Vale Rly Co* (1853) 2 E & B 822, Ex Ch (corporation). See also **TORT** vol 45(2) (Reissue) PARA 548 et seq.

4 *Gregory v Piper* (1829) 9 B & C 591; *Lyons v Martin* (1838) 8 Ad & El 512. See also PARA 562 et seq. Cf *Huzzey v Field* (1835) 2 Cr M & R 432 (infringement of right of ferry); and see **HIGHWAYS, STREETS AND BRIDGES**.

5 *Betts v Neilson*, *Betts v De Vitre* (1868) 3 Ch App 429 at 441-442 per Lord Chelmsford LC (corporation) (affd sub nom *Neilson v Betts* (1871) LR 5 HL 1). See also **PATENTS AND REGISTERED DESIGNS**. As to the liability of an employer for an infringement of copyright by his employees see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 336.

6 *Rapier v London Tramways Co* [1893] 2 Ch 588, CA (corporation); and see **NUISANCE**.

7 *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224, [2006] 4 All ER 395; and see PARA 506. As to breach of statutory duty generally see PARA 495 et seq.

8 See the cases cited in the other notes to this paragraph. See also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1276. For the principle that a corporation is not liable if the act is one which it could not in any circumstances have authorised an employee to commit see PARA 698.

9 *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC (corporation); *Edwards v Midland Rly Co* (1880) 6 QBD 287 (corporation); *Cornford v Carlton Bank Ltd* [1899] 1 QB 392 (affd [1900] 1 QB 22, CA) (corporation). See also PARA 633.

10 *Whitfield v South Eastern Rly Co* (1858) EB & E 115 (corporation); *Citizens' Life Assurance Co Ltd v Brown* [1904] AC 423, PC (corporation; where the defence of privilege was rebutted on proof of actual malice in the employee); cf *Nevill v Fine Arts and General Insurance Co* [1895] 2 QB 156, CA (affd [1897] AC 68, HL). See also **LIBEL AND SLANDER**.

11 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259, Ex Ch (corporation); *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394, PC (corporation); *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317, HL (corporation). See also PARA 697; and **MISREPRESENTATION AND FRAUD**.

12 As to the scope of authority see PARA 691. As to the scope of employment see PARA 692.

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### 683. Employee's liability independent of contract of employment.

As a general rule an employee who commits a tort is liable in damages to the person injured<sup>1</sup>, and his liability is not affected by the existence of a contract of employment<sup>2</sup> or, where he commits the tort in the course of his employment and within the scope of his authority, by the



existence of the corresponding liability of his employer for the same tort<sup>3</sup>, since he is the actual tortfeasor<sup>4</sup>. An employee cannot, therefore, excuse himself from liability for his own act on the ground that he did it solely in his capacity as the employee of another and in obedience to his employer's express orders<sup>5</sup>, or that his employer subsequently adopted or ratified it, unless the act is thereby deprived of its tortious character<sup>6</sup>. Similarly, it is no defence that he acted solely on his employer's behalf and in his employer's interest<sup>7</sup>; nor can he escape responsibility on the ground that he did not know and had no reason to know or to suspect that the act in question was tortious<sup>8</sup>, unless the act is incapable of being regarded as a tort in the absence of actual or imputed knowledge that it is wrongful<sup>9</sup>.

1 As to the cases in which the employer is also liable see PARA 681 et seq.

2 *Lane v Cotton* (1701) 12 Mod Rep 472 at 488 per Holt CJ; *Sands v Child* (1693) 3 Lev 351 at 352; *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA; *Fairline Shipping Corp v Adamson* [1975] QB 180, [1974] 2 All ER 967. Where liability turns on assumption of responsibility, it may be necessary to inquire whether the employee was assuming responsibility personally or only on behalf of the company (in which case the employee commits no tort): compare *Williams v Natural Life Health Foods* [1998] 2 All ER 577, [1998] 1 WLR 830 with *Merrett v Babb* [2001] EWCA Civ 214, [2001] QB 1174, 80 ConLR 43.

3 In such a case he may, however, be entitled to be indemnified by his employer, if he is not in pari delicto: *Dixon v Fawcus* (1861) 3 E & E 537; *Toplis v Grane* (1839) 5 Bing NC 636; *Adamson v Jarvis* (1827) 4 Bing 66.

4 A judgment against the employer is not a bar to an action against his employee or vice versa: see the Civil Liability (Contribution) Act 1978 s 3; and **DAMAGES** vol 12(1) (Reissue) PARAS 837-847. As to the circumstances in which an employee is liable to indemnify his employer against liability incurred by his employer as a result of the employee's breach of his implied duty of care see **EMPLOYMENT** vol 39 (2009) PARA 53.

5 *Sands v Child* (1693) 3 Lev 351 at 352; *Perkins v Smith* (1752) Say 40; *Mill v Hawker* (1874) LR 9 Exch 309; affd (1875) LR 10 Exch 92.

6 *Hull v Pickersgill* (1819) 1 Brod & Bing 282; *Whitehead v Taylor* (1839) 10 Ad & El 210; Cf *Sykes v Sykes* (1870) LR 5 CP 113. See also **AGENCY** vol 1 (2008) PARA 59.

7 *Stephens v Elwall* (1815) 4 M & S 259; *Wilson v Peto* (1821) 6 Moore CP 47; *Cranch v White* (1835) 1 Bing NC 414.

8 *Stephens v Elwall* (1815) 4 M & S 259; cf *Consolidated Co v Curtis & Son* [1892] 1 QB 495.

9 Cf *Day v Bream* (1837) 2 Mood & R 54; *Emmens v Pottle* (1885) 16 QBD 354, CA. See **AGENCY** vol 1 (2008) PARA 59.

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#### **684. Employee not entitled to benefit of provisions excluding employer's liability.**

Where in a contract between an employer and a third person there is a provision excluding the employer's liability, an employee, not being party to the contract, is not entitled to its protection at common law<sup>1</sup>. However, a third party to the contract, including an employee, can avail himself of an exclusion<sup>2</sup> in it under the Contracts (Rights of Third Parties) Act 1999<sup>3</sup> if the contract expressly provides that he may or, unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by him, the exclusion purports to benefit him<sup>4</sup>.

1 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL. See also *Cosgrove v Horsfall* (1945) 175 LT 334; *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA; *Gore v Van der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, CA; *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* [1956] 1 Lloyd's Rep 346, Aust HC. For exceptions see *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, HL (criticised in *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 468-471, [1962] 1 All ER 1 at 7-9, HL, per Viscount Simonds); *New Zealand Shipping Co v AM Satterthwaite & Co Ltd, The Eurymedon* [1975] AC 154, [1974] 1 All ER 1015, PC; *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138, PC; *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA (provision that building owner bears risk of fire exempts third party sub-contractor; not such a close and direct relationship between them for the subcontractor to owe the building owner a duty of care).

2 Contracts (Rights of Third Parties) Act 1999 s 1(6).

3 The Act does not apply in relation to a contract entered into before 11 May 2000, unless the contract is entered into on or after 11 November 1999 and expressly provides for the application of the Contracts (Rights of Third Parties) Act 1999: s 10(2), (3).

4 Contracts (Rights of Third Parties) Act 1999 s 1(1), (2). The employee must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into: s 1(3). The Unfair Contract Terms Act 1977 s 2(2) (restriction on exclusion etc of liability for negligence in respect of loss or damage other than death or personal injury) does not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance on the above provisions: Contracts (Rights of Third Parties) Act 1999 s 7(2). See also **CONTRACT**.

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### **685. Act justifiable if done by employer.**

An employee may justify the commission of an act which is prima facie tortious where it is committed in defence of his employer's person<sup>1</sup> or property<sup>2</sup>, provided the act is one which would have been justifiable if committed by the employer himself. Thus an employee is entitled to evict a trespasser from his employer's land, and for that purpose to make use of such force as may be necessary and unavoidable<sup>3</sup>.

1 *Leewerd v Basilee* (1695) 1 Salk 407; and see **EMPLOYMENT**.

2 *Ewer v Jones* (1846) 9 QB 623. As to defences to actions of tort see PARA 456 et seq.

3 *Piggott v Kemp* (1832) 1 Cr & M 197.

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### **C. RELATIONSHIP WITH PRIMARY TORTFEASOR**

#### **686. Normal requirement of a contract of employment.**

The employer's vicarious liability is normally conditional on the existence of a relationship of employer and employee between himself and the person for whose tort it is sought to hold him liable<sup>1</sup>. There is no single test for determining whether such a relationship exists and the court

must form a rounded view in the light of a range of relevant factors, including the extent of the employer's control of the work done, the mutuality of obligation between the parties, the extent of the worker's integration into the employer's business, the ownership of any tools and equipment, the incidence of risk and the chance of profit<sup>2</sup>. An employer will not generally be held liable for a tort committed by his independent contractor<sup>3</sup>.

1 As to the general requirements of the employer's vicarious liability see PARA 680.

2 See **EMPLOYMENT** vol 39 (2009) PARA 4.

3 See PARA 689.

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### **687. Restriction on choice of employee.**

An employer is not exempt from liability merely on the ground that he is required by law to employ a person who is a member of a particular class or who possesses a particular qualification<sup>1</sup>. It is immaterial that the employer's power of selection is in consequence restricted or even that he is prohibited from himself doing the work for which the employee is employed<sup>2</sup>.

1 *Martin v Temperley* (1843) 4 QB 298 (lightermen on the Thames).

2 *Martin v Temperley* (1843) 4 QB 298 at 312-313 per Coleridge J.

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### **688. Superior and inferior employees.**

A superior employee is not, as such, vicariously liable in respect of the torts of an inferior employee<sup>1</sup> but may incur personal liability as a joint tortfeasor by co-operating in or ordering the commission of a tort<sup>2</sup>.

1 This applies to both Crown servants and those in private employment and whether or not the superior can appoint, dismiss and control the work of the inferior: *Lane v Cotton* (1701) 1 Ld Raym 646; *Stone v Cartwright* (1795) 6 Term Rep 411; *Whitfield v Lord Le Despencer* (1778) 2 Cowp 754; *The Mentor* (1799) 1 Ch Rob 179; *Nicholson v Mouncey* (1812) 15 East 383; *Blaikie v Stembridge* (1859) 6 CBNS 894; *Tobin v R* (1864) 16 CBNS 310 at 351 per Erle CJ; *Raleigh v Goschen* [1898] 1 Ch 73; *Bainbridge v Postmaster-General* [1906] 1 KB 178. As to company directors see *Weir v Bell* (1878) 3 ExD 238; *Cargill v Bower* (1878) 10 ChD 502; *Bear v Stevenson* (1874) 30 LT 177.

2 *Kinsella v Hamilton* (1890) 26 LR Ir 671. He may, perhaps, also incur personal liability by ratification: *Weir v Bell* (1878) 3 ExD 238. Delegation of work by the superior could also be in itself negligent: cf *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407.

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### **689. Employer not generally liable for independent contractor's tort.**

The liability of an employer for the tort of a person in his employment depends upon the existence of the relationship of employer and employee between them and does not arise merely from the fact that a person is engaged to do work on the employer's behalf<sup>1</sup>. If the person employed to do particular work is not in the position of an employee, but is an independent contractor, the employer is not, as a rule, responsible for any tort committed by him in the course of his employment<sup>2</sup>, or by the employees whom he may have engaged for the actual performance of the work<sup>3</sup>, and any person injured thereby must look to the independent contractor for compensation<sup>4</sup>.

There are, however, certain cases in which the employer may be liable for the torts committed by an independent contractor or by the contractor's employees<sup>5</sup>. The mere fact that the contractor is liable does not of itself free the employer from liability<sup>6</sup>.

1 *Milligan v Wedge* (1840) 12 Ad & El 737 at 742; *Sadler v Henlock* (1855) 4 E & B 570; *Randleson v Murray* (1838) 8 Ad & El 109; *Holmes v Onion* (1857) 2 CBNS 790. See also *Pickard v Smith* (1861) 10 CBNS 470 at 480 per Williams J. As to vicarious liability for employees see PARA 680. As to the difference between an employee and an independent contractor see PARA 686; and **EMPLOYMENT** vol 39 (2009) PARA 4.

2 *Rapson v Cubitt* (1842) 9 M & W 710. Cf *Gregory v Shepherds (a firm)* [2000] PNLR 769, CA (liability for personal negligence). A person may be an employee of the employer for one purpose and a contractor for another purpose: *Knight v Fox* (1850) 5 Exch 721. There is clearly no liability when the tort falls outside the scope of the employment: *Pickard v Smith* (1861) 10 CBNS 470 at 480 per Williams J. See also PARA 693.

3 *Milligan v Wedge* (1840) 12 Ad & El 737; *Murray v Currie* (1870) LR 6 CP 24.

4 *Waldock v Winfield* [1901] 2 KB 596, CA; *Morgan v Incorporated Central Council of Girls' Friendly Society* [1936] 1 All ER 404; *Riden v AC Billings & Sons Ltd* [1957] 1 QB 46, [1956] 3 All ER 357, CA (affd sub nom *AC Billings & Sons Ltd v Riden* [1958] AC 240, [1957] 3 All ER 1, HL, overruling *Malone v Laskey* [1907] 2 KB 141, CA, so far as it dealt with negligence). See generally **NEGLIGENCE**. As to the liability of an employer who is also an occupier of premises for damage suffered by visitors to the premises see now the Occupiers' Liability Act 1957 ss 1, 3; and **NEGLIGENCE** vol 78 (2010) PARA 29 et seq. As to the circumstances in which it is a defence for the occupier that he entrusted work to an independent contractor see s 2(4)(b); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 476; **NEGLIGENCE**. As to the liability of a landlord see the Defective Premises Act 1972 s 4; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 475.

5 As to the position where the employer becomes the employer pro hac vice of the contractor's employee see PARAS 712-714.

6 *Penny v Wimbledon UDC* [1899] 2 QB 72, CA.

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### **D. RELATIONSHIP WITH THE TORTIOUS CONDUCT**

#### **690. Employer's liability for acts expressly authorised.**

Where an employer expressly authorises his employee to do a particular act which is in itself a tort<sup>1</sup>, or which necessarily results in a tort<sup>2</sup>, the employer is liable to an action in tort at the suit of the person injured<sup>3</sup>. His liability is equally clear where he ratifies a tort committed by his employee without his authority<sup>4</sup>.

Where the act which the employee is expressly authorised to do is lawful, the employer may nevertheless be responsible for the manner in which the employee executes his authority<sup>5</sup>. If, therefore, the employee does the act in such a manner as to occasion injury to a third person, the employer cannot escape liability merely on the ground that he did not actually authorise the particular manner in which the act was done<sup>6</sup>, or even that the employee was acting on his own behalf and not on that of his employer<sup>7</sup>.

1 *Campbell v Paddington Corpn* [1911] 1 KB 869, DC; *Mill v Hawker* (1874) LR 9 Exch 309 (for subsequent proceedings see (1875) LR 10 Exch 92); *Ellis v Sheffield Gas Consumers Co* (1853) 2 E & B 767 (independent contractor); *Hatch v Hale* (1850) 15 QB 10 (distress).

2 *Gregory v Piper* (1829) 9 B & C 591.

3 As to the defences open in a tort claim see PARA 456 et seq; and **NEGLIGENCE**.

4 *Wilson v Tunman* (1843) 6 Man & G 236 at 242-243 per Tindal CJ; *Lewis v Read* (1845) 13 M & W 834; *Hilbery v Hatton* (1864) 2 H & C 822 (even if unaware the act ratified in unlawful); *Carter v Vestry of St Mary Abbots, Kensington* (1900) 64 JP 548, CA. See also PARA 692. As to the requisites of ratification see **AGENCY** vol 1 (2008) PARA 66.

5 *Limpus v London General Omnibus Co* (1862) 1 H & C 526, Ex Ch; *Hatch v Hale* (1850) 15 QB 10. Apart from the relation of employer and employee, or of principal and agent, a person directing another to do a particular act is not necessarily responsible as to the manner in which it is done: *Lucas v Mason* (1875) LR 10 Exch 251.

6 See PARA 693. See also *Limpus v London General Omnibus Co* (1862) 1 H & C 526, Ex Ch; *Goh Choon Seng v Lee Kim Soo* [1925] AC 550, PC; *Canadian Pacific Rly Co v Lockhart* [1942] AC 591, [1942] 2 All ER 464, PC (unauthorised use of uninsured car on authorised journey); *McKean v Raynor Bros Ltd (Nottingham)* [1942] 2 All ER 650 (use of private car instead of employer's lorry); *LCC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582, [1953] 1 WLR 997, CA (garage hand moving car by driving instead of pushing it); cf *Goodman v Kennell* (1827) 3 C & P 167 (use of horse by employee sent on errand on foot; no vicarious liability). For the liability of bailees and carriers for the acts of their employees see **BAILMENT** vol 3(1) (2005 Reissue) PARA 42; **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 39, 84-85. As to the liability of an employer for infringement of copyright committed by his employees see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 336.

7 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL. See also *Hambro v Burnand* [1904] 2 KB 10, CA (principal and agent); *Bernard v A-G of Jamaica* [2004] UKPC 47, [2005] IRLR 398; and see PARA 692.

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### 691. Implied authority.

The liability of an employer extends to all torts committed by his employee when purporting to act in the course of such business as the employee was authorised or held out as authorised to transact on his employer's account<sup>1</sup>. It is not necessary to prove an express command<sup>2</sup>. If the employee is acting within the scope of his authority his employer is liable whether he receives the benefit of the wrongful act or not<sup>3</sup>. If the employer accepts the benefit of the wrongful act he is liable on the further ground that he has adopted and ratified the employee's act<sup>4</sup>. Where a tort committed by the employee falls within the scope of the authority to be implied from his employment, the employer cannot escape liability on the ground that he gave his employee no authority to commit torts<sup>5</sup>, or even on the ground that he had expressly prohibited the

employee from committing the tort in question<sup>6</sup>. The employer has put the employee into a position to do a particular class of acts on his behalf<sup>7</sup>, and he must therefore accept responsibility for the manner in which the employee conducts himself in the performance of any such act<sup>8</sup>.

1 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 725, HL, per Earl Loreburn.

2 *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259 at 265 per Willes J.

3 *Irwin v Waterloo Taxi-Cab Co Ltd* [1912] 3 KB 588, CA; *Lloyd v Grace, Smith & Co* [1912] AC 716 at 738, HL, per Lord Macnaghten; *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA.

4 *Lloyd v Grace, Smith & Co* [1912] AC 716 at 738, HL, per Lord Macnaghten.

5 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *United Africa Co Ltd v Saka Owoade* [1955] AC 130, [1957] 3 All ER 216, PC; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

6 *Limpus v London General Omnibus Co* (1862) 1 H & C 526, Ex Ch; *Canadian Pacific Rly Co v Lockhart* [1942] AC 591, [1942] 2 All ER 464, PC; *LCC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582, [1953] 1 WLR 997, CA; *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA; *East v Beavis Transport Ltd* [1969] 1 Lloyd's Rep 302, CA; *Rose v Plenty* [1976] 1 All ER 97, [1976] 1 WLR 141, CA. The employer may, however, by the orders he gives, limit the scope of the employee's authority: *Twine v Bean's Express Ltd* (1946) 62 TLR 458, CA; *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266, [1951] 1 All ER 363, CA; *Iqbal v London Transport Executive* (1973) 16 KIR 329, CA. It may be that a claimant who knows of a prohibition and could have avoided the danger cannot recover: *Stone v Taffe* [1974] 3 All ER 1016 at 1022, [1974] 1 WLR 1575 at 1581-1582, CA, per Stephenson LJ. See also PARA 694.

7 But note that vicarious liability is not limited to acts that the employee is authorised to do: *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [21]-[22], [2003] 2 AC 366 at [21]-[22], [2003] 1 All ER 97 at [21]-[22] per Lord Nicholls of Birkenhead.

8 *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259 at 266 per Willes J.

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## 692. Course of employment.

Vicarious liability is not strictly confined to acts done with the employer's authority but extends to acts so closely connected with acts the employee was authorised to do that, for the purpose of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done in the ordinary course of the employee's employment<sup>1</sup>. An employer is liable for the wrongful acts of his employee authorised by him or for wrongful modes of doing authorised acts<sup>2</sup>. The liability may therefore arise where the act is one which, if lawful<sup>3</sup>, would have fallen within the scope of the employee's employment as being in the discharge of his duties<sup>4</sup> or the preservation of the employer's interests<sup>5</sup> or property<sup>6</sup>, or otherwise incidental to the purposes of his employment<sup>7</sup>. The act need not be part of the employee's ordinary employment but may be necessary because of the exigencies of the particular occasion<sup>8</sup>. If, on the other hand, the act is one which, even if lawful, would not have fallen within the scope of the employee's employment<sup>9</sup>, the employer is not liable<sup>10</sup> unless the act is capable of being ratified<sup>11</sup> and is in fact ratified by him<sup>12</sup>. The fact that the act which the employee has done would only be covered by his authority on the supposition that certain facts existed, but which did not in fact exist, does not excuse the employer, provided the employee acted on the belief that they did exist<sup>13</sup>. On the other hand, the employer is not liable merely because the employee, in doing the act, honestly believed that he was acting in his employer's interests and

intended the act to be for the employer's benefit<sup>14</sup>. Time of work and travelling arrangements may be relevant to the limits of course of employment<sup>15</sup>, as may spatial limits<sup>16</sup>.

1 *Lister v Hesley Hall Ltd* [2001] UKHL 22 at [28], [2002] 1 AC 215 at [28], [2001] 2 All ER 769 at [28] per Lord Steyn, and at [70] per Lord Millett; *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [21]-[22], [2003] 2 AC 366 at [21]-[22], [2003] 1 All ER 97 at [21]-[22] per Lord Nicholls of Birkenhead. Some authorities prefer to speak of the scope, rather than course, of employment: see eg *Lister v Hesley Hall Ltd* [2001] UKHL 22 at [40], [2002] 1 AC 215 at [40], [2001] 2 All ER 769 at [40] per Lord Clyde. The interpretations given to such phrases as 'in the course of employment' under statute may differ from its interpretation in deciding upon vicarious liability at common law: *Tower Boot Co Ltd* [1997] 2 All ER 406, [1997] ICR 254, CA (race discrimination).

An employer is not liable where an employee performs a lawful act within his employment which, when linked with other acts not performed in the course of his employment, is tortious: *Crédit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [2000] 1 AC 486, [1999] 1 All ER 929, HL.

2 *Poland v John Parr & Sons* [1927] 1 KB 236 at 240, CA, per Bankes LJ; *Canadian Pacific Rly Co v Lockhart* [1942] AC 591 at 599, [1942] 2 All ER 464 at 467, PC; *LCC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582 at 584-585, [1953] 1 WLR 997 at 998, CA, per Lord Evershed MR; *Ilkiw v Samuels* [1963] 2 All ER 879 at 884, [1963] 1 WLR 991 at 997, CA, per Willmer LJ, and at 889 and 1004 per Diplock LJ; *Kay v ITW Ltd* [1968] 1 QB 140 at 153-154, [1967] 3 All ER 22 at 26-27, CA, per Sellers LJ; *General Engineering Services Ltd v Kingston and St Andrew Corp* [1988] 3 All ER 867 at 869, [1989] 1 WLR 69 at 72, PC; *Lister v Hesley Hall Ltd* [2001] UKHL 22 at [36], [2002] 1 AC 215 at [36], [2001] 2 All ER 769 at [36] per Lord Clyde ('a classic test'), and at [59] per Lord Hobhouse ('classic'); *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [30], [2003] 2 AC 366 at [30], [2003] 1 All ER 97 at [30] per Lord Nicholls of Birkenhead. In *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 All ER 769, the House of Lords admitted the practical utility of the test, but observed that it should not be applied mechanically, especially where intentional misconduct was involved: see especially at [20] per Lord Steyn, at [60] per Lord Hobhouse and at [67], [70] per Lord Millett. See also *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48 at [128], [2003] 2 AC 366 at [128], [2003] 1 All ER 97 at [128] per Lord Millett; *Bernard v A-G of Jamaica* [2004] UKPC 47 at [18], [2005] IRLR 398 at [18].

3 See PARA 685. As to liability for the employee's criminal acts see PARA 697.

4 *Great Western Rly Co v Bunch* (1888) 13 App Cas 31, HL; *Ashton v Spiers and Pond* (1893) 9 TLR 606; cf *Houghton v Pilkington* [1912] 3 KB 308, DC. It is sufficient if the act, though not strictly falling within the employee's ordinary duties, is habitually done by him, to the knowledge of the employer, without question: *Milner v Great Northern Rly Co* (1884) 50 LT 367; *Aitchison v Page Motors Ltd* (1935) 154 LT 128.

5 *Moore v Metropolitan Rly Co* (1872) LR 8 QB 36; *Bayley v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 CP 148, Ex Ch; *Burns v Poulson* (1873) LR 8 CP 563. Cf the cases cited in note 14.

6 *Poland v John Parr & Sons* [1927] 1 KB 236, CA.

7 *Bayley v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 CP 148, Ex Ch; *Lowe v Great Northern Rly Co* (1893) 62 LJQB 524, DC.

8 *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC. Cf where the exigency no longer exists: *Allen v London and South Western Rly Co* (1870) LR 6 QB 65, *Abrahams v Deakin* [1891] 1 QB 516, CA; *Hanson v Waller* [1901] 1 KB 390, DC.

9 *Glasgow Corp v Lorimer* [1911] AC 209, HL; *Edwards v London and North Western Rly Co* (1870) LR 5 CP 445; *Walker v South Eastern Rly Co*, *Smith v South Eastern Rly Co* (1870) LR 5 CP 640; *Houghton v Pilkington* [1912] 3 KB 308, DC. A relevant consideration may be that the task performed was part of another employee's job description and not that of the employee who undertook it: see *Iqbal v London Transport Executive* (1973) 16 KIR 329, CA; *Beard v London General Omnibus Co* [1900] 2 QB 530, CA. Cf *Ricketts v Thos Tilling Ltd* [1915] 1 KB 644, CA; *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA.

10 In the case of a corporation, where the act done is lawful but is ultra vires the corporation, it is not liable: see PARA 698; and **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1232. Cf *Campbell v Paddington Corp* [1911] 1 KB 869, DC.

11 As to the requisites of ratification see **AGENCY** vol 1 (2008) PARA 66.

12 *Lewis v Read* (1845) 13 M & W 834; *Eastern Counties Rly Co v Broom* (1851) 6 Exch 314, Ex Ch; *Roe v Birkenhead, Lancashire and Cheshire Junction Rly Co* (1851) 7 Exch 36; *Carter v Vestry of St Mary Abbots, Kensington* (1900) 64 JP 548, CA; and PARA 690.

13 *Seymour v Greenwood* (1861) 7 H & N 355, Ex Ch; *Bayley v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 CP 148, Ex Ch; *Bank of New South Wales v Owston* (1879) 4 App Cas 270, PC; *Lambert v Great Eastern Rly Co* [1909] 2 KB 776, CA.

14 *Lord Bolingbroke v Swindon Local Board* (1874) LR 9 CP 575; *Kay v ITW Ltd* [1968] 1 QB 140 at 154, [1967] 3 All ER 22 at 26, CA, per Sellers LJ. Cf the cases cited in note 5.

15 The course of employment normally starts when the employee enters his place of work: *Compton v McClure* [1975] ICR 378. Leaving work may be included: *Bell v Blackwood Morton & Sons Ltd* 1960 SC 11, Ct of Sess. Travelling to and from work is not normally within the course of employment unless the employee is required to use the transport or travelling in work time: *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL; *Vandyke v Fender* [1970] 2 QB 292, [1970] 2 All ER 335, CA, distinguished in *Nottingham v Aldridge* [1971] 2 QB 739, [1971] 2 All ER 751; *Elleanor v Cavendish Woodhouse Ltd and Comerford* [1973] 1 Lloyd's Rep 313, CA. Note that an employee may be acting in the course of his employment even though he has finished his day's work: see *Staton v National Coal Board* [1957] 2 All ER 667, [1957] 1 WLR 893 (act done by employee on employer's premises while on way to collect wages); distinguished in *British Transport Commission v Maxine & Co Ltd* (1963) 107 Sol Jo 1024. As to meal and refreshment breaks see the cases in PARA 693 note 5.

16 *Lyons v Martin* (1838) 8 Ad & El 512; *Lewis v Read* (1845) 13 M & W 834; *Stevens v Woodward* (1881) 6 QBD 318 (use of washroom within or outside course of employment depending on whether use allowed or forbidden by employer); *Joseph Rand Ltd v Craig* [1919] 1 Ch 1, CA (fly-tipping).

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### 693. Acts incidental to the employment.

It is not sufficient that the employment merely gave the employee the opportunity to commit the tort<sup>1</sup>, or even that the act in the doing of which the third person was injured was done on the employer's behalf<sup>2</sup>. There must be a close connection between the employee's tortious conduct and the employer's business<sup>3</sup>. But liability extends beyond the performance of duties that the employee was engaged to perform and extends to acts that are reasonably incidental to the employment<sup>4</sup>, even if done for the employee's convenience and not for the employer's benefit<sup>5</sup>. The employer is not liable where the act which gave rise to the injury was an independent act unconnected with the employee's employment, or took place while the employee was engaged on his own and not his employer's business<sup>6</sup>.

1 *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949, [1987] IRLR 286, CA. Even though the employment has merely given the employee the opportunity to commit the tort, the employer may still be liable on the basis of personal negligence if he has failed to check the good character or otherwise of the employee: *Adams (Durham) v Trust Houses* [1960] 1 Lloyd's Rep 380; *Nahhas v Pier House (Cheyne Walk) Management* (1984) 270 Estates Gazette 328; *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA; *De Parrell v Walker* (1932) 49 TLR 37; *Port Swettenham Authority v TW Wu & Co* [1979] AC 580, [1978] 3 All ER 337, PC.

2 *Joseph Rand Ltd v Craig* [1919] 1 Ch 1, CA; *Kay v ITW Ltd* [1968] 1 QB 140 at 154, [1967] 3 All ER 22 at 26, CA, per Sellers LJ; and PARA 692 note 14.

3 See PARA 692.

4 *Burns v Poulson* (1873) LR 8 CP 563; *Thomson v British Steel Corpn* 1977 SLT 26, Ct of Sess (employer liable for negligent driving of employee where driving was incidental to his employment); *Heasmans v Clarity Cleaning Co Ltd* [1987] ICR 949, [1987] IRLR 286, CA (no nexus between tortious or criminal act and circumstances of employment); *Irving and Irving v Post Office* [1987] IRLR 289, CA.



5 *Ruddiman & Co v Smith* (1889) 60 LT 708, DC (use of lavatory); *Smith v Martin and Kingston-upon-Hull Corpn* [1911] 2 KB 775, CA; *Jefferson v Derbyshire Farmers Ltd* [1921] 2 KB 281, CA; *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509, [1942] 1 All ER 491, HL (cases of employees smoking while handling petrol in course of duties); contrast *Williams v Jones* (1865) 3 H & C 602, Ex Ch; *Kirby v National Coal Board* 1957 SLT 367 (affd 1958 SC 514). Collecting wages has been regarded as within the course of employment (*Staton v National Coal Board* [1957] 2 All ER 667, [1957] 1 WLR 893), as has leaving work (*Bell v Blackwood Morton & Sons Ltd* 1960 SC 11, Ct of Sess). As to meal and refreshment breaks see *Higbid v RC Hammett Ltd* (1932) 49 TLR 104, CA; *Crook v Derbyshire Stone Ltd* [1956] 2 All ER 447, [1956] 1 WLR 432; *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, [1958] 1 All ER 657; *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74, [1961] 1 WLR 705; *Stewarts (Edinburgh) Holdings Ltd v Lord Advocate* 1966 SLT 86, Sh Ct. As regards practical jokes played on a fellow employee see *Coddington v International Harvester Co of Great Britain Ltd* (1969) 6 KIR 146; *Chapman v Oakleigh Animal Products Ltd* (1970) 8 KIR 1063, CA; *Harrison v Michelin Tyre Co Ltd* [1985] 1 All ER 918, [1985] ICR 696. As regards the employer's personal liability in respect of practical jokes compare *Smith v Crossley Brothers* (1951) 95 Sol Jo 655, CA, with *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 QB 348, [1957] 2 All ER 229.

6 See PARA 695.

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#### **694. Acts prohibited by the employer.**

The employer cannot escape responsibility where the act is otherwise one for which he is responsible, on the ground that he had forbidden the employee to do the act in the manner which produced the injury<sup>1</sup>. The employer may, however, by the orders he gives, limit the scope of the employee's employment, rather than merely prescribing the ways in which the employment may or may not be performed<sup>2</sup>.

1 *Limpus v London General Omnibus Co* (1862) 1 H & C 526, Ex Ch; *Whatman v Pearson* (1868) LR 3 CP 422; *Canadian Pacific Rly Co v Lockhart* [1942] AC 591, [1942] 2 All ER 464, PC; *LCC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582, [1953] 1 WLR 997, CA; *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA; *East v Beavis Transport Ltd* [1969] 1 Lloyd's Rep 302, CA; *Rose v Plenty* [1976] 1 All ER 97, [1976] 1 WLR 141, CA. Aliter where the fact that the act was forbidden showed that it was outside the scope of the employee's authority: see cases in note 2. Cf *Harris v Perry & Co* [1903] 2 KB 219, CA (where the act, though purportedly forbidden, was tacitly allowed). See also PARA 691.

2 *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62 at 67, HL, per Lord Dunedin; *Ilkiw v Samuels* [1963] 2 All ER 879 at 890, [1963] 1 WLR 991 at 1004, CA, per Diplock LJ. See also *Stevens v Woodward* (1881) 6 QBD 318, DC; *Twine v Bean's Express Ltd* (1946) 62 TLR 458, CA; *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266, [1951] 1 All ER 363, CA; *Daniels v Whetstone Entertainments Ltd* [1962] 2 Lloyd's Rep 1, CA; *Iqbal v London Transport Executive* (1973) 16 KIR 329, CA.

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#### **695. Employee engaged on his own business.**

If at the time when the injury takes place the employee is engaged, not on his employer's business, but on his own, the employer's vicarious liability does not arise because the employee is not acting in the course of employment<sup>1</sup>. In such a case it is immaterial whether the employee is using his employer's property with his employer's permission<sup>2</sup>, so long as he is clearly acting on his own business<sup>3</sup>, or whether he is using it surreptitiously, and is therefore, as

regards his employer, a trespasser<sup>4</sup>. Where, however, the employee, whilst using his employer's property in the course of his employment, embarks upon business of his own, and the injury is occasioned afterwards, the employer's liability continues<sup>5</sup> unless the employee, in deviating from the business which he was employed to perform, can no longer be considered to be acting in the course of his employment, and must be regarded as engaged in a separate transaction<sup>6</sup>.

1 *Storey v Ashton* (1869) LR 4 QB 476; *Sanderson v Collins* [1904] 1 KB 628, CA; *Kooragang Investments Pty Ltd v Richardson and Wrench Ltd* [1982] AC 462, [1981] 3 All ER 65, PC (moonlighting). See also *General Engineering Services Ltd v Kingston and St Andrew Corp* [1988] 3 All ER 867, [1989] 1 WLR 69, PC (firemen deliberately delaying arrival at fire as part of campaign of industrial action). But note that an employer will be vicariously liable notwithstanding that the employee was acting exclusively for his own benefit if the unlawful act was sufficiently connected with his employment: *Bernard v A-G of Jamaica* [2004] UKPC 47, [2005] IRLR 398.

2 *Cormack v Digby* (1876) IR 9 CL 557, where the employee had borrowed his employer's cart for his own purposes, and it was held that the employer was not liable although the employee had offered to bring back certain goods on his employer's behalf and the employer had agreed; *Higbid v RC Hammett Ltd* (1932) 49 TLR 104, CA; *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74, [1961] 1 WLR 705.

3 *Sanderson v Collins* [1904] 1 KB 628, CA. But a criminal act may be sufficiently connected with the employment as to give rise to vicarious liability: see PARA 697.

4 *Joel v Morison* (1834) 6 C & P 501 ('going on a frolic of his own'); *Rayner v Mitchell* (1877) 2 CPD 357, where it was held to be immaterial that the employee, after taking his employer's cart for his own purposes, had called on his return journey for certain goods belonging to his employer; *Sanderson v Collins* [1904] 1 KB 628, CA (distinguishing *Coupé Co v Maddick* [1891] 2 QB 413, DC). Cf *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Aitchison v Page Motors Ltd* (1935) 180 LT 128; *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co* 1925 SC 796, Ct of Sess; *Adams (Durham) Ltd and Day v Trust Houses* [1960] 1 Lloyd's Rep 380.

5 *Patten v Rea* (1857) 2 CBNS 606, where the employee, who was driving a pig, was going on a journey partly on his employer's business and partly on private business of his own; *Sleath v Wilson* (1839) 9 C & P 607; *Venables v Smith* (1877) 2 QBD 279; *Higbid v RC Hammett Ltd* (1932) 49 TLR 104, CA.

6 It is a question of degree as to how far the deviation should be considered a separate transaction: *Storey v Ashton* (1869) LR 4 QB 476 at 480 per Cockburn CJ. Cf *Williams v A and W Hemphill Ltd* 1965 SLT 200.

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## 696. Delegation.

An employer may be responsible for the default of his employee acting in the course of the employee's employment, even though the act which caused injury was performed by a stranger<sup>1</sup> or by another employee acting outside his employment, where the employee for whose default it is sought to make the employer liable allowed the act to be performed, for example where he permitted a vehicle of which he was the driver to be driven by or left in the charge of another person<sup>2</sup>. In such a case, the employer is not liable unless the employee for whose default it is sought to make the employer liable was himself guilty of negligence or some other tort in allowing the act to be done<sup>3</sup>, and this conduct was within the scope of his employment<sup>4</sup> and the effective cause of the injury<sup>5</sup>.

1 *Booth v Mister* (1835) 7 C & P 66; *Engelhart v Farrant & Co* [1897] 1 QB 240, CA; *Trust Co Ltd v de Silva* [1956] 1 WLR 376, [1956] 1 Lloyd's Rep 309, PC; *East v Beavis Transport Ltd* [1969] 1 Lloyd's Rep 302, CA. Cf *Mann v Ward* (1892) 8 TLR 699, CA.

2 *Engelhart v Farrant & Co* [1897] 1 QB 240, CA; *Beard v London General Omnibus Co* [1900] 2 QB 530, CA; *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA; *East v Beavis Transport Ltd* [1969] 1 Lloyd's Rep 302, CA.

3 *Ricketts v Thos Tilling Ltd* [1915] 1 KB 644, CA. Cf *Trust Co Ltd v de Silva* [1956] 1 WLR 376, [1956] 1 Lloyd's Rep 309, PC.

4 See *Gwilliam v Twist* [1895] 2 QB 84, CA; *Coogan v Dublin Motor Co* (1914) 49 ILT 24. Cf *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA.

5 *Engelhart v Farrant & Co* [1897] 1 QB 240, CA.

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### 697. Employer's liability in tort for employee's criminal act.

In accordance with the principle that an employer is liable for the acts of an employee when acting within the scope of his authority, an employer is not exempt from liability in tort because his employee's act amounts to a crime, provided it is an act that is sufficiently connected with the employment<sup>1</sup>. The employer may thus be liable, irrespective of personal negligence<sup>2</sup>, when an employee steals goods entrusted to the employer by a third party<sup>3</sup>, or defrauds the employer's client or business partner while in a position of trust<sup>4</sup>, or commits an assault<sup>5</sup> (even a sexual assault<sup>6</sup>) in the course of employment. However, it is not sufficient to give rise to vicarious liability that the employee used his employment to gain the opportunity to commit the offence<sup>7</sup>.

1 *Osborn v Gillett* (1873) LR 8 Exch 88; *Dyer v Munday* [1895] 1 QB 742; CA; *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA.

2 Eg in appointing or supervising his employees: *Adams (Durham) v Trust Houses* [1960] 1 Lloyd's Rep 380; *Nahhas v Pier House (Cheyne Walk) Management Ltd* (1984) 270 Estates Gazette 328; *Williams v Curzon Syndicate Ltd* (1919) 35 TLR 475, CA; *De Parrell v Walker* (1932) 49 TLR 37.

3 *United Africa Co Ltd v Saka Owoade* [1955] AC 130, [1957] 3 All ER 216, PC (applying *Lloyd v Grace, Smith & Co* [1912] AC 716, HL); *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2005] 2 All ER (Comm) 783, [2004] 2 Lloyd's Rep 251. As to where the employee's negligence facilitates the theft, compare *Abraham v Bullock* (1902) 86 LT 796, CA, with *Cobb v Great Western Rly Co* [1893] 1 QB 459, CA.

4 *Lloyd v Grace, Smith & Co* [1912] AC 716, HL; *Uxbridge Permanent Benefit Building Society v Pickard* [1939] 2 KB 248, [1939] 2 All ER 344, CA; *Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)* [2002] UKHL 48, [2003] 2 AC 366, [2003] 1 All ER 97. Cf *Slingsby v District Bank Ltd* [1931] 2 KB 588; *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, HL; *JJ Coughlan Ltd v Ruparelia* [2003] EWCA Civ 1057, [2004] PNL 4. As to the employee's negligent facilitation of fraud see *HSBC Bank plc v So* [2009] EWCA Civ 296, [2009] All ER (D) 82 (May), [2009] 1 CLC 503. See also PARA 682.

5 *Seymour v Greenwood* (1861) 7 H & N 355, Ex Ch; *Eastern Counties Rly Co v Broom* (1851) 6 Exch 314; *Bayley v Manchester, Sheffield and Lincolnshire Rly Co* (1873) LR 8 CP 148, Ex Ch; *Dyer v Munday* [1895] 1 QB 742, CA; *Fennelly v Connex South Eastern Ltd* [2001] IRLR 390, CA; *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887, [2004] 4 All ER 85, [2003] 1 WLR 2158; *Bernard v A-G of Jamaica* [2004] UKPC 47, [2005] IRLR 398; *Gravil v Carroll* [2008] EWCA Civ 689, [2008] ICR 1222, [2008] IRLR 829. See also PARA 682. The employer is not liable if the assault was an act of private vengeance on the part of the employee, not committed in the course of, or otherwise closely connected with, his employment: *Warren v Henlys Ltd* [1948] 2 All ER 935; *Daniels v Whetstone Entertainments* [1962] 2 Lloyd's Rep 1; *Keppel Bus Co Ltd v Sa'ad Bin Ahmed* [1974] 2 All ER 700, [1974] 1 WLR 1082, PC; *A-G of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273. See also *Richards v West Middlesex Waterworks Co* (1885) 15 QBD 660. In an exceptional case, vicarious liability may arise even in respect of the use of a firearm: see *Bernard v A-G of Jamaica* [2004] UKPC 47, [2005] IRLR 398; *Brown v Robinson* [2004] UKPC 56, [2004] All ER (D) 208 (Dec), distinguishing *A-G of the*

*British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273 (all cases involving police officers). As to harassment see *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 22, [2006] 4 All ER 395.

6 *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, [2001] 2 All ER 769. Cf *Makanjuola v Metropolitan Police Comr* (1990) 2 Admin LR 214, (1990) 154 LG Rev 248; *N v Chief Constable of Merseyside* [2006] EWHC 3041 (QB), [2006] Po LR 160.

7 *N v Chief Constable of Merseyside* [2006] EWHC 3041 (QB), [2006] Po LR 160 (police officer off duty but in uniform, showed warrant card).

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### **E. PARTICULAR PARTIES SUBJECT TO VICARIOUS LIABILITY**

#### **698. Corporations.**

Where an employee of a corporation commits a tortious act, the corporation is not liable if the act is one which it could not in any circumstances have authorised an employee to commit<sup>1</sup>. Where, however, the act is not ultra vires the corporation, and is committed by the employee within the scope of his authority and in the course of his employment by the corporation, the corporation is liable<sup>2</sup> and cannot escape liability on the ground that, being a corporation, it cannot commit torts<sup>3</sup>.

1 *Poulton v London and South Western Rly Co* (1867) LR 2 QB 534; *Ormiston v Great Western Rly Co* [1917] 1 KB 598. But cf *Campbell v Paddington Corp* [1911] 1 KB 869, DC. In favour of a person dealing in good faith with a company the power of the directors to bind the company or authorise others to do so is free of any limitation under the constitution of the company: see the Companies Act 2006 s 40; and **COMPANIES** vol 14 (2009) PARA 263.

2 See PARA 692. See also **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1276 et seq. As to the statutory exception relating to transactions in favour of persons dealing with a company see note 1.

3 *Barwick v English Joint Stock Bank* (1867) LR 2 Exch 259, Ex Ch. A corporation will not be liable for a tort committed by an employee of a wholly owned subsidiary: *R v Waverley Construction Co Ltd* (1972) 30 DLR (3d) 224. As to the principle that the corporation may be liable even though the tort committed involves malice or guilty knowledge see PARA 682. As to the criminal liability of corporations see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1280; **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 38.

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#### **699. Public authorities.**

Although in general a public authority is responsible for the acts of its employees, it is not liable when the tort is committed by the employee in the discharge of a duty which he is required to perform as a public duty imposed upon himself, and not as a duty imposed upon the authority to be performed through its employee<sup>1</sup>.

1 See eg *Stanbury v Exeter Corp* [1905] 2 KB 838, DC. See **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 184. As to public authorities see PARAS 718-721.

The chief officer of police for a police area is liable for torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment: see the Police Act 1996 s 88(1); and **POLICE** vol 36(1) (2007 Reissue) PARA 105. See *Weir v Bettison (sued as Chief Constable of Merseyside Police)* [2003] EWCA Civ 111, [2003] ICR 708, where Sir Denis Henry, at [11], affirmed the proposition that the liability of a chief officer of police for wilful acts by constables is more extensive than the vicarious liability of an employer. Cf *Makanjuola v Metropolitan Police Comr* (1990) 2 Admin LR 214, (1990) 154 LG Rev 248; *N v Chief Constable of Merseyside* [2006] EWHC 3041 (QB), [2006] Po LR 160.

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### 700. Trustees.

The liability of private trustees and personal representatives for the acts of their employees is considered elsewhere in this work<sup>1</sup>.

Trustees who have the management and control of property for public purposes are not exempt from liability for the acts or defaults of any person employed for the purpose of carrying out their duties on the ground that they act gratuitously<sup>2</sup>. They may be able to exempt themselves from liability by dispelling any inference that the act or default complained of amounted to a breach of any duty imposed upon them as regards the person injured<sup>3</sup>, or that the relation of employer and employee, or of principal and agent, existed between themselves and the person actually at fault<sup>4</sup>.

1 See **TRUSTS** vol 48 (2007 Reissue) PARA 1084 et seq; **EXECUTORS AND ADMINISTRATORS**.

2 *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93 (applying *Parnaby v Lancaster Canal Co* (1839) 11 Ad & El 223, Ex Ch, and reviewing the earlier conflicting cases); *Coe v Wise* (1866) LR 1 QB 711.

3 *Forbes v Lee Conservancy Board* (1879) 4 ExD 116.

4 *Metcalf v Hetherington* (1860) 5 H & N 719, Ex Ch.

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### 701. Crown's liability for its employees' torts.

Subject to certain savings and limitations<sup>1</sup> the Crown is liable to the same extent as if it were a private individual of full age and capacity for torts committed by its employees and agents, and is also liable in respect of torts committed by its officers in the performance or purported performance of functions conferred on them as such as if those functions had been imposed solely by instructions from the Crown<sup>2</sup>.

1 For the savings and limitations in question see generally **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 383.

<sup>2</sup> See the Crown Proceedings Act 1947 s 2; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 382. As to the procedure in actions against the Crown, and the special provisions applying to such proceedings, see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 110.

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## **F. PRINCIPALS AND AGENTS**

### **702. Vicarious liability for agents.**

As the function of an agent is to create contractual relations and transact dispositions of property between his principal and a third party in accordance with authority or on the basis of ratification<sup>1</sup>, this may involve torts of deceit<sup>2</sup>, misrepresentation<sup>3</sup> and conversion<sup>4</sup>. The liability of the principal in respect of these torts will depend on scope of authority or ratification<sup>5</sup> rather than on course of employment<sup>6</sup>. Agents may also be employees or independent contractors and their employer-principals will be liable for torts committed in these capacities as for employees and independent contractors who are not agents<sup>7</sup>.

There may also be agency liability in respect of persons not ordinarily regarded as employees or independent contractors. These include partners<sup>8</sup>, solicitors<sup>9</sup>, sheriffs and bailiffs<sup>10</sup> and persons using vehicles for the common purposes of the owner and the user<sup>11</sup>.

If a person without actual or apparent authority, or acting in excess of the authority that he has, professes to a third party to have authority and his action is not ratified but disowned by the alleged principal, the purported agent will be liable for the breach of warranty of authority to the third party for loss caused by the lack of authority<sup>12</sup>. Such a claim is primarily regarded as contractual<sup>13</sup> but if the misrepresentation of authority was made deliberately or recklessly the claim could be brought in deceit<sup>14</sup> and be subject to the measure of damages applicable in tort<sup>15</sup>.

<sup>1</sup> See **AGENCY** vol 1 (2008) PARA 29 et seq. As to ratification see **AGENCY** vol 1 (2008) PARA 57 et seq.

<sup>2</sup> *Briess v Woolley* [1954] AC 333, [1954] 1 All ER 909, HL.

<sup>3</sup> *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA; *Howard Marine and Dredging Co v A Odgen & Sons Ltd* [1978] QB 574, [1978] 2 All ER 1134, CA; *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850. An agent will not be liable under the Misrepresentation Act 1967 s 2(1) (see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 801) for negligent misrepresentation but could be liable at common law: see *Resolute Maritime Inc v Nippon Kaiji Kyokai, The Skopas* [1983] 2 All ER 1, [1983] 1 WLR 857.

<sup>4</sup> *Hilbery v Hatton* (1864) 2 H & C 822.

<sup>5</sup> *Armagas Ltd v Mundogas SA, The Ocean Frost* [1986] AC 717, [1986] 2 All ER 385, HL.

<sup>6</sup> See Atiyah *Vicarious Liability* (1967).

<sup>7</sup> See Atiyah *Vicarious Liability* (1967).

<sup>8</sup> See the Partnership Act 1890 ss 10, 11; and **PARTNERSHIP** vol 79 (2008) PARA 24.

<sup>9</sup> A client may be liable for the torts of a solicitor in issuing legal process or perhaps in continuing proceedings when it was clear they were ill-founded: *Bate v Pilling* (1826) 6 B & C 38; *Jarmain v Hooper* (1843) 6 Man & G 827; *Morris v Salberg* (1889) 22 QBD 614, CA; *Clissold v Cratchley* [1910] 2 KB 244, CA; *Lee v Rumilly* (1891) 55 JP 519. See **LEGAL PROFESSIONS** vol 66 (2009) PARAS 825, 875-876.

10 A sheriff in levying execution is not generally an agent of the judgment creditor, who will only be liable if he gives specific instructions to carry out tortious acts: *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107, [1954] 1 WLR 1212, CA. See also *Wilson v Tumman* (1843) 6 Man & G 236; *Morris v Salberg* (1889) 22 QBD 614, CA. A sheriff is liable for the acts of his officers, and the scope of their authority and course of employment has been interpreted widely: *Smith v Pritchard* (1849) 8 CB 565; *Smart v Hutton* (1833) 8 Ad & El 568n. A landlord may be liable for a bailiff levying distress on the basis of specific authority or ratification (eg *Carter v Vestry of St Mary Abbots Kensington* (1899) 63 JP 487) or scope of authority (eg *Perring & Co v Emerson* [1906] 1 KB 1, DC). As to sheriffs generally see **SHERIFFS**.

11 *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753, [1953] 1 WLR 1120, CA; *The Thelma* [1953] 2 Lloyd's Rep 613, HL; *Carberry v Davies* [1968] 2 All ER 817, [1968] 1 WLR 1103, CA; *Vandyke v Fender* [1970] 2 QB 292, [1970] 2 All ER 335, CA; *Nelson v Raphael* [1979] RTR 437. There must be an element of joint enterprise, hence returning a car (*Klein v Caluori* [1971] 2 All ER 701, [1971] 1 WLR 619), and household shopping (*Norwood v Navan* [1981] RTR 457, CA) are not sufficient common purposes for owner's liability. See also PARA 703.

12 See **AGENCY** vol 1 (2008) PARAS 160-161. See also *Collen v Wright* (1857) 8 E & B 647. The purported agent will not be liable if apparent or ostensible authority existed (*Rainbow v Howkins* [1904] 2 KB 322 at 326), or the agent is an agent of the Crown (*Dunn v Macdonald* [1897] 1 QB 555, CA). See also *Rashdall v Ford* (1866) LR 2 Eq 750 (misrepresentation of law).

13 *Dickson v Reuter's Telegram Co Ltd* (1877) 3 CPD 1 at 5, CA, per Bramwell LJ; *The Piraeus* [1974] 2 Lloyd's Rep 266, CA; *SEB Trygg Liv Holding AB v Manches* [2005] EWCA Civ 1237 at [60], [2006] 1 All ER 437 at [60], [2006] 1 WLR 2276 at [60] per Buxton LJ; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 4 All ER 545 at [93] per Lord Hoffmann. See also PARA 408. As to liability in contract see **CONTRACT**.

14 *Polhill v Walter* (1832) 3 B & Ad 114.

15 *Doyle v Olbey (Ironmongers) Ltd* [1969] 2 QB 158, [1969] 2 All ER 119, CA; *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, sub nom *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, HL (all direct consequences, not merely those foreseeable). As to the measure of damages in tort see **DAMAGES** vol 12(1) (Reissue) PARA 851 et seq.

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### 703. Liability for drivers of vehicles.

If the driver of a vehicle is an employee or independent contractor the general rules of vicarious liability apply<sup>1</sup>. If the owner of the vehicle authorises a person who is neither an employee nor an independent contractor to drive the vehicle partly for the owner's purposes, or partly for the owner's purposes and partly for his own purposes, the owner will be liable for torts incidental to that use<sup>2</sup>. Mere permission to use the vehicle is not enough<sup>3</sup>.

1 As to employees see eg *Limpus v London General Omnibus Co* (1862) 1 H & C 526, Ex Ch; *Beard v London General Omnibus Co* [1900] 2 QB 530, CA; *Ricketts v Thos Tilling Ltd* [1915] 1 KB 644; *Canadian Pacific Rly Co v Lockhart* [1942] AC 591, [1942] 2 All ER 464, PC; *LCC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582, [1953] 1 WLR 997, CA; *Ilkiw v Samuels* [1963] 2 All ER 879, [1963] 1 WLR 991, CA; *Kay v ITW Ltd* [1968] 1 QB 140, [1967] 3 All ER 22, CA; *Nottingham v Aldridge* [1971] 2 QB 739, [1971] 2 All ER 751; *Iqbal v London Transport Executive* (1973) 16 KIR 329, CA; *Rose v Plenty* [1976] 1 All ER 97, [1976] 1 WLR 141, CA; *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL. As to independent contractors see *Rogers v Night Riders* [1983] RTR 324, CA.

2 *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753, [1953] 1 WLR 1120, CA (car driven for holiday for owner and driver); *The Thelma* [1953] 2 Lloyd's Rep 613 (boat); *Carberry v Davies* [1968] 2 All ER 817, [1968] 1 WLR 1103, CA; *Vandyke v Fender* [1970] 2 QB 292, [1970] 2 All ER 335, CA; *Nelson v Raphael* [1979] RTR 437, CA. In such cases the drivers have been termed 'agents' of the person held vicariously liable: *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753, [1953] 1 WLR 1120, CA. Such cases were once determined on control or the right to control, giving a wider liability than arises in the current law: see *Samson v Aitchinson*

[1912] AC 844, PC; *Pratt v Patrick* [1924] 1 KB 488; *Parker v Miller* (1926) 42 TLR 408, CA. Cf *Chowdhary v Gillot* [1947] 2 All ER 541 (employee driving claimant's vehicle).

3 *Morgans v Launchbury* [1973] AC 127, [1972] 2 All ER 606, HL (wife allowing husband to use car); *Higbid v RC Hammett Ltd* (1932) 49 TLR 104, CA; *Hewitt v Bonvin* [1940] 1 KB 188, CA. Hence an owner is not liable for a driver returning a borrowed car (*Klein v Caluori* [1971] 2 All ER 701, [1971] 1 WLR 619) or for a spouse going shopping (*Norwood v Navan* [1981] RTR 457, CA). The decision in *Scarsbrook v Mason* [1961] 3 All ER 767, where a passenger was held liable for the driver's negligence on the basis of joint enterprise, seems hard to reconcile with the principle that a mere permission to drive does not make the owner liable for the driver's negligence (*Morgans v Launchbury* [1973] AC 127, [1972] 2 All ER 606, HL) and the correctness of the decision has been doubted (*S v Walsall Metropolitan Borough Council* [1985] 1 WLR 1150 at 1153, CA, per Oliver LJ).

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#### 704. Effect on liability of agent.

The employer's vicarious liability does not preclude the personal liability of the agent. An agent, including a public agent<sup>1</sup>, who commits a wrongful act<sup>2</sup> in the course of his employment, is personally liable to any third person who suffers loss or damage thereby<sup>3</sup>, notwithstanding that the act was expressly authorised or ratified by the principal<sup>4</sup>, unless it was thereby deprived of its wrongful character<sup>5</sup>. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful<sup>6</sup>, except in cases where actual malice is essential to constitute the wrong<sup>7</sup>. An agent cannot generally rely upon an exclusion clause contained in the contract between the principal and the third party<sup>8</sup>, unless on the wording of the contract the principal has contracted not only on his own behalf, but also on behalf of his agent<sup>9</sup>.

1 *Entick v Carrington* (1765) 19 State Tr 1029; *Adams v Naylor* [1946] AC 543, [1946] 2 All ER 241, HL (decided before the passing of the Crown Proceedings Act 1947; as to the remedies thereby conferred see PARA 418). At common law a public agent could not be sued in his official capacity: *Raleigh v Goschen* [1898] 1 Ch 73; *Bainbridge v Postmaster General* [1906] 1 KB 178, CA. As to the liability of Crown servants and as to proceedings against government departments see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**. As to the immunity from legal process of diplomatic agents of foreign governments see **INTERNATIONAL RELATIONS LAW**.

2 An agent is liable only for his personal act and not for the acts of his co-agents (*Re Denham & Co* (1883) 25 ChD 752) or sub-agents (*Stone v Cartwright* (1795) 6 Term Rep 411), unless he is a partner (*Weir v Bell* (1878) 3 ExD 238 at 244, CA, per Bramwell LJ), or has otherwise made himself a principal in the transaction (*Cargill v Bower* (1878) 10 ChD 502 at 514 per Fry J; *Weir v Bell* (1878) 3 ExD 238 at 249, CA, per Cockburn CJ), or unless he is made liable by statute.

3 *Bennett v Bayes, Pennington and Harrison* (1860) 5 H & N 391; *Swift v Jewsbury and Goddard* (1874) LR 9 QB 301; *Lowe v Dorling & Son* [1906] 2 KB 772, CA; *Cope v Sharpe (No 2)* [1912] 1 KB 496, CA.

4 *Johnson v Emerson and Sparrow* (1871) LR 6 Exch 329 (attorney). As to the liability of the principal see generally **AGENCY** vol 1 (2008) PARAS 150-154. As to the right of the third party to rescission of contracts made as a result of a misrepresentation by the agent see **AGENCY** vol 1 (2008) PARA 135; **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 727, 812 et seq. As to the right of action in respect of misrepresentation see **AGENCY** vol 1 (2008) PARAS 135, 152-153; and see generally **MISREPRESENTATION AND FRAUD**. For a consideration of the tort of conversion by an agent see **AGENCY** vol 1 (2008) PARA 165. As to conversion see **TORT** vol 45(2) (Reissue) PARA 548 et seq.

5 *Hull v Pickersgill* (1819) 1 Brod & Bing 282; *Anderson v Watson* (1827) 3 C & P 214; *Sykes v Sykes* (1870) LR 5 CP 113; and contrast *Sharland v Mildon* (1846) 5 Hare 469; *Padget v Priest* (1877) 2 Term Rep 97.

6 *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73.

7 *Eaglesfield v Marquis of Londonderry* (1878) 38 LT 303, HL; *Tims v John Lewis & Co Ltd* [1951] 2 KB 459, CA; revsd sub nom *John Lewis & Co Ltd v Tims* [1952] AC 676, [1952] 1 All ER 1203, HL, but approved on this



point at 683 and 1206 per Lord Porter. See also *Egger v Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406, CA (agent relying on qualified privilege was held not to be affected by malice of principal).

8 *Adler v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397, CA; *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Canadian General Electric Co Ltd v The Lake Bosomtwe and Pickford and Black Ltd* [1970] 2 Lloyd's Rep 81. For exceptions see *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd*, *The Eurymedon* [1975] AC 154, [1974] 1 All ER 1015, PC; *Port Jackson Stevedoring Pty v Salmond and Spraggon (Australia) Pty* [1980] 3 All ER 257, [1981] 1 WLR 138, PC; *Norwich City Council v Harvey* [1989] 1 All ER 1180, [1989] 1 WLR 828, CA; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 85.

9 A third party to a contract can avail himself of an exclusion in it if the contract expressly provides that he may or, unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by him, the exclusion purports to benefit him: see the Contracts (Rights of Third Parties) Act 1999; and PARA 684. As to the common law see *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158; *Alsey Steam Fishing Co Ltd v Hillman (Owners)*, *The Kirknes* [1957] P 51, [1957] 1 All ER 97. The limitations on liability of shipowners and carriers by air conferred by statute extend also to their servants and agents acting in the course of their employment: see eg **CARRIAGE AND CARRIERS** vol 7 (2008) PARAS 154 et seq, 639 et seq; **SHIPPING AND MARITIME LAW** vol 93 (2008) PARAS 195-197.

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## **G. NON-DELEGABLE DUTIES**

### **705. Non-delegable duty of employer of independent contractor.**

An employer is not generally liable for torts committed by his independent contractor but liability may arise where the law imposes on him a non-delegable duty not merely to take care but to ensure that care is taken<sup>1</sup>. Where such a duty exists, it is not discharged by delegating its performance<sup>2</sup> to a contractor if the latter in fact performs it negligently<sup>3</sup>.

A non-delegable duty does not arise simply because one person employs another to do work which involves or results in a duty towards a third party<sup>4</sup>, but the classes of case in which such a duty exists at common law are not well defined. The principal categories are where the work to be done involves either special danger to others<sup>5</sup> or danger on the highway<sup>6</sup>. Outside these categories of special dangers and highways<sup>7</sup>, it should be noted that an employer owes a non-delegable duty of care to his employees, and may be liable to an employee for failure to take reasonable care to provide a competent staff, adequate material, a safe place of work, a proper system or effective supervision even though he has engaged for this purpose contractors who, while generally competent, were negligent in the particular case<sup>8</sup>. Certain statutory duties<sup>9</sup>, the duties of a hospital to its patients<sup>10</sup>, the duties of a bailee for reward<sup>11</sup>, and the duty not to let one's land cause a nuisance to a neighbour<sup>12</sup> are also non-delegable and therefore involve liability for independent contractors.

1 Liability for breach of a non-delegable duty is to be contrasted with liability for the employer's breach of a personal duty: see eg the Occupiers' Liability Act 1957 s 2(4)(b); *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789 at 803, [1968] 1 WLR 1028 at 1044 per Mocatta J. It should also be contrasted with liability as a joint tortfeasor for authorising the commission of a tort (*Quarman v Burnett* (1840) 6 M & W 499 at 507 per Parke B; *M'Laughlin v Pryor* (1842) 4 Man & G 48; *Burgess v Gray* (1845) 1 CB 578) or ratifying the tortious conduct (*Jolliffe v Willmetts & Co* [1971] 1 All ER 478).

As to contributions between the employer and the contractor in such cases see the Civil Liability (Contribution) Act 1978; and **DAMAGES** vol 12(1) (Reissue) PARAS 837-847. See also *Daniel v Rickett, Cockerell & Co Ltd and Raymond* [1938] 2 KB 322, [1938] 2 All ER 631. As to contribution between joint tortfeasors generally see PARA 447 et seq; and **DAMAGES** vol 12(1) (Reissue) PARAS 837-846.

2 As to the distinction between discharge of the duty and delegation of its performance see *Davie v New Merton Board Mills Ltd* [1959] AC 604, [1959] 1 All ER 346, HL, which should now be considered in the light of the Employers Liability (Defective Equipment) Act 1969; and **EMPLOYMENT** vol 39 (2009) PARA 33.

3 *Dalton v Angus & Co* (1881) 6 App Cas 740 at 829, HL, per Lord Blackburn; *Cassidy v Ministry of Health* [1951] 2 KB 343 at 363, [1951] 1 All ER 574 at 587, CA, per Denning LJ.

4 *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191 at 197, CA, per Slesser LJ.

5 See PARAS 706-707.

6 See PARA 708; and **HIGHWAYS, STREETS AND BRIDGES**.

7 Before the enactment of the Occupiers' Liability Act 1957, an occupier was responsible where his common law duty to an invitee had been performed negligently by an independent contractor: see *Thomson v Cremin* (1941) [1953] 2 All ER 1185, [1956] 1 WLR 103n, HL. See also *Pickard v Smith* (1861) 10 CBNS 470, where the plaintiff appears to have been a licensee. Such liability is now restricted: see the Occupiers' Liability Act 1957 s 2(4)(b); and PARA 689.

8 *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628, HL; *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906, [1987] 2 All ER 878, HL (duty to provide safe system non-delegable but not strict); and see **EMPLOYMENT** vol 39 (2009) PARA 33. See also PARAS 710-714.

9 See PARA 709.

10 *Cassidy v Ministry of Health* [1951] 2 KB 343, [1951] 1 All ER 574, CA. Cf *A (A Child) v Ministry of Defence* [2004] EWCA Civ 641, [2005] QB 183, [2004] 3 WLR 469; *Farraj v King's Healthcare NHS Trust* [2009] EWCA Civ 1203, [2009] All ER (D) 158 (Nov), 111 BMLR 131.

11 *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA; *British Road Services Ltd v Arthur V Crutchley* [1968] 1 All ER 811, [1968] 1 Lloyd's Rep 271, CA.

12 *Dalton v Angus & Co* (1881) 6 App Cas 740, HL; *Hughes v Percival* (1883) 8 App Cas 443 at 446, HL; *Lemaitre v Davis* (1881) 19 ChD 281; *Matania v National Provincial Bank Ltd and Elevenist Syndicate Ltd* [1936] 2 All ER 633, CA; *Alcock v Wraith* (1991) 59 BLR 20, CA. There is no comparable duty to ensure a contractor on one's land takes reasonable care not to cause personal injury: *Rapson v Cubitt* (1842) 9 M & W 710; *Green v Fibreglass Ltd* [1958] 2 QB 245, [1958] 2 All ER 521.

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## 706. Employment of contractor on dangerous or unlawful work.

An employer who employs an independent contractor to execute inherently dangerous work from which, in the natural course of things, injurious consequences to others must be expected to arise unless measures are adopted by which such consequences may be prevented, is bound to see that everything is done which is reasonably necessary to avoid those consequences<sup>1</sup>. He cannot, therefore, relieve himself of his responsibility in such a case by proving that he had delegated the performance of this duty to the contractor employed to do the work, or to some independent person<sup>2</sup>, however competent the contractor or delegate may be<sup>3</sup>. In accordance with the same principle, where the work which the independent contractor is employed to do is of a character that is inherently dangerous to the public unless done with proper precautions, the employer is responsible to any member of the public who sustains injury in consequence of the manner in which the work is done<sup>4</sup>. It has been said that the non-delegable duty in respect of inherently dangerous work is anomalous and that its application is truly exceptional<sup>5</sup>.

An employer who employs an independent contractor to execute work which is in itself unlawful is responsible to third persons for any injuries sustained by them in consequence of the execution of the work by the independent contractor<sup>6</sup>.

1 *Bower v Peate* (1876) 1 QBD 321; *Pendlebury v Greenhalgh* (1875) 1 QBD 36, CA; *Hughes v Percival* (1883) 8 App Cas 443; *Black v Christchurch Finance Co Ltd* [1894] AC 48, PC; *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191, CA; *Balfour v Barty-King (Hyder & Sons (Builders) Ltd, third parties)* [1957] 1 QB 496, [1957] 1 All ER 156, CA; *Johnson (t/a Johnson Butchers) v BJW Property Developments Ltd* [2002] EWHC 1131 (TCC), [2002] 3 All ER 574, 86 ConLR 74. The employer's duty is not absolute but merely a duty to ensure that reasonable care is taken by the contractor: *Bower v Peate* (1876) 1 QBD 321 at 327 per Cockburn CJ; *Hughes v Percival* (1883) 8 App Cas 443 at 446 per Lord Blackburn; *Dalton v Angus & Co* (1881) 6 App Cas 740 at 829, HL, per Lord Blackburn; *Penny v Wimbledon UDC* [1899] 2 QB 72 at 78, CA, per Romer LJ; *The Pass of Ballater* [1942] P 112 at 117, [1942] 2 All ER 79 at 84 per Langton J.

2 *Bower v Peate* (1876) 1 QBD 321 at 326 per Cockburn CJ.

3 See the cases cited in note 1. It is immaterial that the employer has stipulated for proper precautions to be taken: *Bower v Peate* (1876) 1 QBD 321; *Black v Christchurch Finance Co Ltd* [1894] AC 48, PC. The liability does not extend to collateral acts of negligence on the part of the contractor or his employees: see PARA 708 text and notes 17-18.

4 *Pickard v Smith* (1861) 10 CBNS 470; *Blake v Thirst* (1863) 2 H & C 20; *Gray v Pullen* (1864) 5 B & S 970, Ex Ch; *Tarry v Ashton* (1876) 1 QBD 314; *Penny v Wimbledon UDC* [1899] 2 QB 72, CA; *Hill v Tottenham UDC* (1898) 79 LT 495; *The Snark* [1900] P 105, CA; *Daniel v Rickett, Cockerell & Co Ltd and Raymond* [1938] 2 KB 322 at 324-325, [1938] 2 All ER 631 at 632-633 per Hilbery J; *Robinson v Beaconsfield RDC* [1911] 2 Ch 188, CA.

5 *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257 at [85], [2009] 3 WLR 324 at [85], 122 ConLR 1 at [85].

6 *Ellis v Sheffield Gas Consumers Co* (1853) 2 E & B 767.

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### 707. Special dangers.

It has been said that the non-delegable duty in respect of inherently dangerous work arises only in respect of activities that are exceptionally dangerous whatever precautions are taken<sup>1</sup>. The inquiry is into the intrinsic quality of the operation in question, disregarding circumstances that may have increased the danger on the facts of the individual case<sup>2</sup>. Examples of special dangers that have been recognised in decided cases include dangerous building operations<sup>3</sup>, the blasting of rock<sup>4</sup>, work adjacent to gas pipes<sup>5</sup>, use of a benzoline lamp which exploded on the highway<sup>6</sup>, photography by magnesium flash<sup>7</sup> and the use of an oxy-acetylene burner in an oil-tank ship<sup>8</sup>. With these it is a duty not merely to take care but to provide that care is taken so that if there is negligence on the part of the contractor, the duty on the employer is broken<sup>9</sup>. Conversely, it has been decided that welding is not an exceptionally dangerous activity giving rise to a non-delegable duty on the employer commissioning its performance<sup>10</sup>.

The arranging of an aircraft journey does not, it seems, set in motion a thing dangerous in itself, such as would render an employer liable at common law for the act of an independent contractor<sup>11</sup>.

1 *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257 at [78], [2009] 3 WLR 324 at [78], 122 ConLR 1 at [78].

2 *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257 at [81], [2009] 3 WLR 324 at [81], 122 ConLR 1 at [81].

3 *Hughes v Percival* (1883) 8 App Cas 443, HL; *Alcock v Wraith* (1991) 59 BLR 20, CA (re-roofing terraced house with risk of damage to other houses); *Stewart v Malik* [2009] CSIH 5, 2009 SC 265. Contrast *Green v Fibreglass Ltd* [1958] 2 QB 245, [1958] 2 All ER 521 (electrical wiring not work involving special danger to others; defendants discharged their duty by employing competent electrical contractors to re-wire premises); *Cook v Broderip* (1968) 112 Sol Jo 193; *Bluett v King Core Demolition Services* (1973) 227 Estates Gazette 503 (non-hazardous demolition work).

4 *Paterson v Lindsay* (1885) 23 Sc LR 180.

5 *Hardaker v Idle District Council* [1896] 1 QB 335, CA (excavation under gas main), but this conflicts with the view that danger from the circumstances in which work is done is irrelevant (see text to note 2) and the decision may best be regarded as turning on a non-delegable duty under statute: see *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257 at [71], [2009] 3 WLR 324 at [71], 122 ConLR 1 at [71]. In relation to danger from gas, cf *Rapson v Cubitt* (1842) 9 M & W 710. See also *Brooke v Bool* [1928] 2 KB 578, DC (seeking gas escape with naked light).

6 *Holliday v National Telephone Co* [1899] 2 QB 392, CA, explained in *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191 at 199, CA, per curiam as not dependent on the duty relating to the highway. But cf *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257 at [71], [2009] 3 WLR 324 at [71], 122 ConLR 1 at [71]. See also PARA 708 note 13.

7 *Honeywill and Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd* [1934] 1 KB 191, CA. Cases where employers of contractors were held liable for escapes of fire under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, include *Black v Christchurch Finance Co Ltd* [1894] AC 48, PC; *Balfour v Barty-King (Hyder & Sons (Builders) Ltd, third parties)* [1957] 1 QB 496, [1957] 1 All ER 156, CA; *Johnson (t/a Johnson Butchers) v BJW Property Developments Ltd* [2002] EWHC 1131 (TCC), [2002] 3 All ER 574, 86 ConLR 74. As to liability in nuisance for damage by fire see *Spicer v Smea* [1946] 1 All ER 489. As to an occupier's liability for fire see generally **FIRE SERVICES**.

8 *The Pass of Ballater* [1942] P 112, [1942] 2 All ER 79. Cf *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] 3 WLR 324, 122 ConLR 1 (welding not exceptionally dangerous).

9 *The Pass of Ballater* [1942] P 112 at 117, [1942] 2 All ER 79 at 84 per Langton J.

10 *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] 3 WLR 324, 122 ConLR 1. Cf *The Pass of Ballater* [1942] P 112, [1942] 2 All ER 79 (note 8 above).

11 *Fosbroke-Hobbes v Airwork Ltd and British-American Air Services Ltd* [1937] 1 All ER 108 at 112 per Goddard J.

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## 708. Dangers on highways.

With regard to highways a distinction must be drawn between the exercise of the public right to pass and repass, on the one hand, and the execution of work upon the highway, on the other. The employer is not answerable where exercise of his right of passage occasions danger to other persons on the highway owing to the negligence of a contractor, such as a hired driver<sup>1</sup>, a hired drover<sup>2</sup> or a motor repairer<sup>3</sup>. Where, however, the employer contracts for the execution<sup>4</sup> of fixed works on the highway<sup>5</sup> or on a navigable river<sup>6</sup>, even though the works themselves are lawful<sup>7</sup>, he is liable if his contractor occasions<sup>8</sup> dangers there, for example from heaps of soil<sup>9</sup>, or an open cellar flap<sup>10</sup>, or overhead objects insecurely fixed<sup>11</sup>. The liability is not restricted to persisting dangers<sup>12</sup> in the nature of nuisance<sup>13</sup>, but extends to isolated events, such as the explosion of a benzoline lamp<sup>14</sup> or the falling of a brick<sup>15</sup>.

Even in those cases where the employer is under a personal duty he is not liable for every negligent act of an independent contractor. The employer is responsible only where the contract which he has made is one by which he entrusts performance of his duty to the independent contractor<sup>16</sup>. Again, the employer has been held not liable for damage resulting from the casual or collateral negligence of an independent contractor, or of the latter's employees<sup>17</sup>, while doing the work contracted to be done<sup>18</sup>.

1 *Quarman v Burnett* (1840) 6 M & W 499; *Willard v Whiteley Ltd* [1938] 3 All ER 779, CA.

2 *Milligan v Wedge* (1840) 12 Ad & El 737; but contrast *Pinn v Rew* (1916) 32 TLR 451.

3 *Phillips v Britannia Hygienic Laundry Co* [1923] 1 KB 539 (affd on another point [1923] 2 KB 832, CA); *Stennett v Hancock and Peters* [1939] 2 All ER 578. However, liability may be assumed in respect of vehicles used by independent contractors: *Rogers v Night Riders* [1983] RTR 324, CA (booking centre for private hire cars).

4 The employer may not be liable for a contractor who is employed only to deliver goods for the employer's use and negligently creates a danger on the highway: see *Clarke v J Sugrue & Sons Ltd* (1959) Times, 29 May, where the contractor left a rope lying on the highway.

5 It has been said in *The Snark* [1900] P 105 at 110, CA, per AL Smith LJ that: '*Pickard v Smith* (1861) 10 CBNS 470 is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be used by persons lawfully entitled to do so'.

6 *The Snark* [1900] P 105, CA; *Hole v Sittingbourne and Sheerness Rly Co* (1861) 6 H & N 488 (breach of statutory duty); but see *The Jersey* [1942] P 119, where there was held to be no liability because the defendants had delegated their duties to competent persons.

7 *Hardaker v Idle District Council* [1896] 1 QB 335 at 351, CA; *Holliday v National Telephone Co* [1899] 2 QB 392 at 398, CA.

8 The employer is not liable where the negligence of the contractor is only casual or collateral to the object of the contract: see the text and notes 17-18.

9 *Penny v Wimbledon UDC* [1899] 2 QB 72, CA.

10 *Daniel v Rickett, Cockerell & Co Ltd and Raymond* [1938] 2 KB 322, [1938] 2 All ER 631.

11 *Tarry v Ashton* (1876) 1 QBD 314 (lamp bracket attached to wall); *Maxwell v British Thomson-Houston Co Ltd* (1902) 18 TLR 278, CA (standard). See also *Walsh v Holst & Co Ltd* [1958] 3 All ER 33, [1958] 1 WLR 800, CA (brick permitted to fall).

12 A private nuisance must amount to a state of affairs rather than a single isolated act: see *Stone v Bolton* [1950] 1 KB 201, [1949] 2 All ER 851, CA; revsd on the issue of negligence sub nom *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078, HL. See further **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 329; **NUISANCE** vol 78 (2010) PARAS 107-108.

13 It has long been settled that the employer is liable for his contractor's stationary works which obstruct or endanger the public right of passage: *Bush v Steinman* (1799) 1 Bos & P 404.

14 *Holliday v National Telephone Co* [1899] 2 QB 392, CA. See also *Pinn v Rew* (1916) 32 TLR 451. See notes 11, 13.

15 *Walsh v Holst & Co Ltd* [1958] 3 All ER 33, [1958] 1 WLR 800, CA.

16 *Thomson v Cremin* (1941) [1953] 2 All ER 1185 at 1191, [1956] 1 WLR 103n at 110, HL, per Lord Wright; *Pickard v Smith* (1861) 10 CBNS 470 at 480 per curiam; *Cook v Square D Ltd* [1992] ICR 262, sub nom *Square D Ltd v Cook*, [1992] IRLR 34, CA. The occupier of a ship did not delegate his former common law duty towards an invitee to an intending purchaser who contracted for a trip (*Hobson v Bartram & Sons Ltd* [1950] 1 All ER 412, CA); and see further *Daniel v Metropolitan Rly Co* (1871) LR 5 HL 45; *The Bearn* [1906] P 48, CA. See also *Davie v New Merton Board Mills Ltd* [1959] AC 604, [1959] 1 All ER 346, HL.

17 *Quarman v Burnett* (1840) 6 M & W 499; *Dalton v Angus & Co* (1881) 6 App Cas 740 at 829, HL.

18 Negligence is said to be casual or collateral when it arises incidentally in the course of the performance of, and not directly from, the act authorised: *Hole v Sittingbourne and Sheerness Rly Co* (1861) 6 H & N 488 at 497 per Pollock CB; *Pickard v Smith* (1861) 10 CBNS 470 at 480 per Williams J; *Gray v Pullen* (1864) 5 B & S 970 at 985, Ex Ch, per Erle CJ; *Cassidy v Ministry of Health* [1951] 2 KB 343 at 364, [1951] 1 All ER 574 at 587, CA, per Denning LJ; *Walsh v Holst & Co Ltd* [1958] 3 All ER 33 at 36, [1958] 1 WLR 800, CA, per Hodson LJ. An example of casual negligence is letting a stone or tool fall upon the highway: *Reedie v London and North Western Rly Co* (1849) 4 Exch 244; *Penny v Wimbledon UDC* [1899] 2 QB 72 at 76, CA, per A L Smith LJ; *Padbury v Holliday and Greenwood Ltd* (1912) 28 TLR 494, CA. See also *Rowe v Herman* [1997] 1 WLR 1390, 58 Con LR 33, CA (metal plates laid on highway not an essential part of contract work and risk). On the other hand, the contractor's negligence in the following cases was held to be not casual: where a plumber was engaged, on a highway, in connecting telephone wire tubes, and had to use a benzoline lamp of which the safety valve was known to be out of order and injury was caused to a passer-by owing to the lamp exploding (*Holliday v National Telephone Co* [1899] 2 QB 392, CA); where heaps of soil due to excavation in a highway were negligently left unguarded (*Penny v Wimbledon UDC* [1899] 2 QB 72, CA; but see *Peachey v Rowland* (1853) 13 CB 182; cf *Hardaker v Idle District Council* [1896] 1 QB 335, CA; *Robinson v Beaconsfield RDC* [1911] 2 Ch 188 at 198, CA, per Buckley LJ); leaving the movable derrick or platform used for working at an electric tram standard so near the lines as to injure a passenger on a tram (*Maxwell v British Thomson-Houston Co Ltd* (1902) 18 TLR 278, CA).

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### **709. Employer under statutory obligation to execute work.**

An employer who is under a statutory obligation to execute particular work and who entrusts the execution of it to an independent contractor is responsible to third persons for any injury sustained by them in consequence of the improper execution of the work by the independent contractor<sup>1</sup>.

1 *Hole v Sittingbourne and Sheerness Rly Co* (1861) 6 H & N 488; *Gray v Pullen* (1864) 5 B & S 970, Ex Ch; *Hyams v Webster* (1867) LR 2 QB 264 (affd (1868) LR 4 QB 138, Ex Ch); *Hardaker v Idle District Council* [1896] 1 QB 335, CA; *Robinson v Beaconsfield RDC* [1911] 2 Ch 188, CA; *Smith v Cammell Laird & Co Ltd* [1940] AC 242, [1939] 4 All ER 381, HL; *Hosking v De Havilland Aircraft Co Ltd* [1949] 1 All ER 540. The employers may, however, be exempt from liability under the terms of the statute imposing the duty: *Howitt v Nottingham Tramways Co* (1883) 12 QBD 16, DC; see also *Barham v Ipswich Dock Comrs* (1885) 54 LT 23.

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### **(iii) Independent Contractors and Other Person's Employees**

#### **A. INDEPENDENT CONTRACTORS**

#### **710. Duties personal to employer.**

If an employer entrusts the execution of the personal non-delegable duties he owes with regard to his employees at common law<sup>1</sup> to an independent contractor appointed for the purpose, the employer is liable for any negligence on the part of the contractor or the contractor's employees or agents<sup>2</sup>.

So, too, where statute imposes a duty on an employer of labour for the protection of his workers, the employer usually remains liable, unless statute otherwise provides, for any breach of the duty even though he has delegated its performance to another<sup>3</sup>.

1 *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628, HL; *Davie v New Merton Board Mills Ltd* [1959] AC 604, [1959] 1 All ER 346, HL (the specific decision in this case reversed by the Employer's Liability (Defective Equipment) Act 1969: see **EMPLOYMENT; HEALTH AND SAFETY AT WORK**); *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906, [1987] 2 All ER 878, HL. See also PARA 675.

2 See *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57 at 83-84, [1937] 3 All ER 628 at 643, HL, per Lord Wright; *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906, [1987] 2 All ER 878, HL. See also *Paine v Colne Valley Electricity Supply Co Ltd* [1938] 4 All ER 803; *Pratt v Richards* [1951] 2 KB 208, [1951] 1 All ER 90n; *Morris v Breaveglen Ltd* [1993] ICR 766, [1993] IRLR 350; *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14 (liability for safe system abroad; cf *Cook v Square D Ltd* [1992] ICR 262, sub nom *Square D Ltd v Cook* [1992] IRLR 34, CA).

3 See PARA 709; and also **HEALTH AND SAFETY AT WORK**. As to statutory liability under the Employer's Liability (Defective Equipment) Act 1969 see PARA 675; and **EMPLOYMENT; HEALTH AND SAFETY AT WORK**. As regards civil liability for breach of statutory duty see PARA 672 et seq.

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## **B. EMPLOYMENT OF OTHER PERSON'S EMPLOYEES**

### **711. Liability for torts of another person's employees.**

The general, as distinguished from the special or temporary, employer is normally liable for all torts committed by his employees in the course of their employment and within the scope of their employment, and his liability is not affected by the existence of a contract between him and some other person for the temporary employment of the employees in work for that person or for the hiring of the employees to that person<sup>1</sup>. The general employer is, therefore, normally responsible for the acts of his employees, not only to third persons, but also to the person with whom he contracted<sup>2</sup>, provided the employee who commits the tort is acting in the course of his employment<sup>3</sup>. Exceptionally, where there is shared control of the hired employee, there may be a dual vicarious liability on both the general employer and the hirer<sup>4</sup>.

1 *Dalyell v Tyrer* (1858) EB & E 899; *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1, [1946] 2 All ER 345, HL; *Kauppan Bhoomidas v Port of Singapore Authority* [1978] 1 All ER 956, [1978] 1 WLR 189, PC. It is easier to show that a full transfer has taken place when an unskilled worker is borrowed rather than when a worker together with vehicle or machinery has been lent: see *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437 at 444, [1955] 2 All ER 561 at 564, CA, per Denning LJ; and compare *Gibb v United Steel Cos Ltd* [1957] 2 All ER 110, [1957] 1 WLR 668 with *Brady v Giles* (1835) 1 Mood & R 494 and *Sykes v Millington* [1953] 1 QB 770, [1953] 1 All ER 1098, DC; but see *McGregor v JS Duthie & Sons & Co Ltd* 1966 SLT 133, Ct of Sess (transfer even though general employer was in lorry with loaned employee). A contractual term transferring the employee's employment from the general employer to a hirer may act, as regards the general employer, as an exclusion of liability and so be subject to the Unfair Contract Terms Act 1977: *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, [1987] 1 WLR 659n, CA. Cf *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA (contractual transfer to hirer of general employer's liability, but not the employment; not an exclusion clause within Unfair Contract Terms Act 1977).

2 *Holmes v Onion* (1857) 2 CBNS 790.

3 There is no liability if the relationship of employer and employee does not exist between the supplier of the labour and the person whose labour is supplied and who does the wrongful act: *Hall v Lees* [1904] 2 KB 602, CA.

4 *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510, [2005] 4 All ER 1181. Cf *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, [2006] Lloyd's Rep IR 307, [2006] IRLR 817; *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] 3 WLR

324, 122 ConLR 1. As to contribution between joint tortfeasors see the Civil Liability (Contribution) Act 1978; PARA 447 et seq; and **DAMAGES** vol 12(1) (Reissue) PARAS 837-846.

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### **712. Circumstances in which temporary and not general employer is liable.**

In order to absolve the general employer from liability and to make the person with whom he has contracted for the execution of work or the hire of an employee vicariously liable for the acts of the general employer's employee<sup>1</sup>, it is necessary to prove that the relationship of employer and employee has been temporarily constituted between that person and the general employer's employee and that it existed at the time when the tort was committed<sup>2</sup>.

1 The general employer may be personally liable if he lends an incompetent worker: *McConkey v Amec plc* (1990) 27 Con LR 88, CA. In certain circumstances a person may also be under a personal, and not merely a vicarious, liability for the acts of an independent contractor or the contractor's employees by reason of the principle that a person who procures the execution of inherently dangerous work which is likely to have injurious consequences unless proper precautions are observed cannot relieve himself from responsibility by delegating its performance to an independent contractor: see PARA 706. As to the liability of a person who employs an independent contractor to perform unlawful work see PARA 706; as to the liability of a person who, where he is under a statutory duty to execute work, employs a contractor see PARA 709. A situation may arise whereby the hirer of an employee may become liable as a joint tortfeasor if he intervenes without authority to give directions how the work should be done and damage is thereby caused, although he is not *pro hac vice* the employer of the man in question: see *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] AC 1 at 12, [1946] 2 All ER 345 at 349, HL, per Viscount Simon. See also *Hardaker v Idle District Council* [1896] 1 QB 335 at 344, CA.

2 As to cases where vicarious responsibility was considered to rest on the general employer see PARA 713 note 9. As to cases where vicarious responsibility was considered to rest on the hirer see PARA 713 note 8. As to dual vicarious liability see PARA 711.

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### **713. Onus of proof.**

The presumption is against a transfer of an employee of such a kind as to make the hirer or person on whose behalf the employee is temporarily working responsible for the employee's acts, and a heavy burden rests upon the party seeking to establish that the relationship of employer and employee has been constituted, for the time being<sup>1</sup>, between the temporary employer and the general employer's employee<sup>2</sup>. It seems that the onus may be easier to discharge if labour only, particularly unskilled labour, and not both machinery and labour to operate it, are supplied by the general employer<sup>3</sup>.

The fact that a term of the contract between the hirer and the supplier of a workman purports to lay down whose employee the workman concerned is to be deemed to be does not conclude the question who is liable for injury caused by the workman's negligence<sup>4</sup>.

The questions of by whom the negligent employee was engaged, who paid him, and who had power to dismiss him do not determine the matter, but may be relevant considerations<sup>5</sup>. To



succeed in discharging the burden, it must be shown that *pro hac vice* the temporary employer had the right<sup>6</sup> to control how the work should be done<sup>7</sup>. Whether<sup>8</sup> or not<sup>9</sup> the temporary employer had such a right in any particular case is a question of fact<sup>10</sup>.

If it can be shown that the relationship of employer and employee exists *pro hac vice*, the liability of the temporary employer is the same whether the lending of the employee is gratuitous or for reward<sup>11</sup>.

1 See *Savory v Holland, Hannen and Cubitts (Southern) Ltd* [1964] 3 All ER 18 at 20, [1964] 1 WLR 1158 at 1162, CA, per Lord Denning MR.

2 *Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509, [1942] 1 All ER 491, HL (no transfer of independent contractor's employees, but merely a transfer of the benefit of their services); *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 10, [1946] 2 All ER 345 at 348, HL, per Viscount Simon, at 13 and 349 per Lord Macmillan, and at 21 and 353 per Lord Uthwatt; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 at [7], [2006] QB 510 at [7], [2005] 4 All ER 1181 at [7] per May LJ. In *Holt v WH Rhodes & Sons Ltd* [1949] 1 All ER 478 at 480, CA, per Lord Merriman P, it was said that the same heavy onus is placed on an employee seeking to establish that a temporary employer owes him a duty to provide a reasonably safe system of working.

3 See *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 17, [1946] 2 All ER 345 at 351, HL, per Lord Porter, and at 22 and 354 per Lord Uthwatt; *Garrard v AE Southey & Co and Standard Telephones and Cables Ltd* [1952] 2 QB 174 at 179, [1952] 1 All ER 597 at 600 per Parker J; *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA; *Gibb v United Steel Cos Ltd* [1957] 2 All ER 110, [1957] 1 WLR 668.

4 *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 10, [1946] 2 All ER 345 at 348, HL, per Viscount Simon, at 13-14 and 349-350 per Lord Macmillan, at 15 and 350 per Lord Porter, at 20 and 353 per Lord Simonds, and at 22 and 354 per Lord Uthwatt. An employee's contract of employment cannot be transferred without his consent: *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1, [1946] 2 All ER 345, HL; *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA. A term in the contract between the hirer and the contractor may, however, determine the liability of the hirer and contractor as between themselves for the acts of the workman: *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 15, [1946] 2 All ER 345 at 350, HL, per Lord Porter; *Herdman v Walker (Tooting) Ltd (City Plant Hirers Ltd, third party)* [1956] 1 All ER 429, [1956] 1 WLR 209 (hirers of crane and driver liable to indemnify owners of crane); *Thompson v T Lohan (Plant Hire) Ltd* [1987] 2 All ER 631, [1987] 1 WLR 649, CA.

5 *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 10, [1946] 2 All ER 345 at 347, HL, per Viscount Simon, and at 17 and 351 per Lord Porter; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 at [7], [2006] QB 510 at [7], [2005] 4 All ER 1181 at [7] per May LJ. See also *Quarman v Burnett* (1840) 6 M & W 499; *Reedie v London and North Western Rly Co, Hobbit v London and North Western Rly Co* (1849) 4 Exch 244; *Ready Mixed Concrete (East Midlands) Ltd v Yorkshire Traffic Area Licensing Authority* [1970] 2 QB 397, [1970] 1 All ER 890, DC.

6 As to the liability of a hirer who interferes without authority in the way work is done see PARA 712 note 1.

7 See *Donovan v Laing, Wharton and Down Construction Syndicate Ltd* [1893] 1 QB 629 at 633-634, CA, per Bowen LJ; *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 10-12, [1946] 2 All ER 345 at 348-349, HL, per Viscount Simon, at 14 and 350 per Lord Macmillan, at 16 and 351 per Lord Porter, at 18 and 352 per Lord Simonds, and at 21 and 354 per Lord Uthwatt; *Savory v Holland, Hannen and Cubitts (Southern) Ltd* [1964] 3 All ER 18 at 20, [1964] 1 WLR 1158 at 1163, CA, per Lord Denning MR; *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 at [7], [2006] QB 510 at [7], [2005] 4 All ER 1181 at [7] per May LJ. In situations of joint control, dual vicarious liability may arise: see PARA 711. For a general discussion of the indicia of the relationship of employer and employee see **EMPLOYMENT** vol 39 (2009) PARA 2 et seq. The test has sometimes been concisely expressed as whether the employee or the benefit of his work was transferred: *Moore v Palmer* (1886) 2 TLR 781 at 782, CA, per Bowen LJ; *Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509, [1942] 1 All ER 491, HL; *Ready Mixed Concrete (East Midlands) Ltd v Yorkshire Traffic Area Licensing Authority* [1970] 2 QB 397, [1970] 1 All ER 890, DC.

8 For instances in which temporary employers have stood in the relation of employers and employees with the persons employed see eg *Murray v Currie* (1870) LR 6 CP 24 (cf *Union Steamship Co Ltd v Claridge* [1894] AC 185, PC, cited in note 9); *Rourke v White Moss Colliery Co* (1877) 2 CPD 205, CA; *Baumwoll Manufactur von Carl Scheibler v Furness* [1893] AC 8, HL; *Donovan v Laing, Wharton and Down Construction Syndicate Ltd* [1893] 1 QB 629, CA (hire of crane and driver; doubted and distinguished in *Mersey Docks and Harbour Board v*

*Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1, [1946] 2 All ER 345, HL; *Jones v Scullard* [1898] 2 QB 565; *Wilmerson v Lynn and Hamburg Steamship Co Ltd* [1913] 3 KB 931, CA; *Bain v Central Vermont Rly Co* [1921] 2 AC 412, PC; *AH Bull & Co v West African Shipping Agency and Lighterage Co* [1927] AC 686, PC; *Clinker v Stevens* (1943) 78 Ll L Rep 501n; *Gibb v United Steel Cos Ltd* [1957] 2 All ER 110, [1957] 1 WLR 668; *McGregor v JS Duthie & Sons & Co Ltd* 1966 SLT 133, Ct of Sess; *Hawley v Luminar Leisure Ltd* [2006] EWCA Civ 18, [2006] Lloyd's Rep IR 307, [2006] IRLR 817. See also the cases cited in PARA 714 note 1. As to agency staff see *McMeechan v Secretary of State for Employment* [1997] ICR 549, [1997] IRLR 353, CA; *Clark v Oxfordshire Health Authority* [1998] ICR 125, [1998] IRLR 125, CA; *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, [2004] ICR 1437, [2004] IRLR 358.

9 For instances in which temporary employers have been held not to have become the employer *pro hac vice* of persons in the general employment of others see eg *Laugher v Pointer* (1826) 5 B & C; *Quarman v Burnett* (1840) 6 M & W 499; *Dalyell v Tyrer* (1858) EB & E 899; *Innocent v Peto* (1864) 4 F & F 8; *Moore v Palmer* (1886) 2 TLR 781, CA; *Waldock v Winfield* [1901] 2 KB 596, CA; *Union Steamship Co Ltd v Claridge* [1894] AC 185, PC (cf *Murray v Currie* (1870) LR 6 CP 24, cited in note 8); *Willard v Whiteley Ltd* [1938] 3 All ER 779, CA; *Dowd v Boase & Co Ltd* [1945] KB 301, [1945] 1 All ER 605, CA; *Johnson v AH Beaumont Ltd and Ford Motor Co* [1953] 2 QB 184, [1953] 2 All ER 106; *The Panther and The Ericbank* [1957] P 143, [1957] 1 All ER 641 (tug involved in collision in course of towage contract; officer in charge of tug employee of tug owners not of owners of tow); *Savory v Holland, Hannen and Cubitts (Southern) Ltd* [1964] 3 All ER 18, [1964] 1 WLR 1158, CA; *Ready Mixed Concrete (East Midlands) Ltd v Yorkshire Traffic Area Licensing Authority* [1970] 2 QB 397, [1970] 1 All ER 890, DC; *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] 3 WLR 324, 122 ConLR 1.

10 *Brady v Giles* (1835) 1 Mood & R 494; *M'Cartan v Belfast Harbour Comrs* [1911] 2 IR 143 at 151-152, HL, per Lord Dunedin; *Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509 at 515, [1942] 1 All ER 491 at 495, HL, per Lord Wright; *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd* [1947] AC 1 at 21, [1946] 2 All ER 345 at 354, HL, per Lord Uthwatt.

11 *Donovan v Laing, Wharton and Down Construction Syndicate Ltd* [1893] 1 QB 629 at 633, CA, per Lord Esher MR. As to the actual decision in this case see note 8.

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#### **714. Duty of hirer and temporary employer towards employee.**

If the general employer has parted for the time being with his rights of control as employer and those rights have been assumed by the temporary employer, the latter has all the responsibilities attaching to the relationship of employer and employee towards the employee<sup>1</sup>.

Even if the relationship does not amount to one of temporary employment, the hirer will be liable if in all the circumstances he failed to use reasonable care for the safety of the employee<sup>2</sup>.

1 *Garrard v AE Southey & Co and Standard Telephones and Cables Ltd* [1952] 2 QB 174, [1952] 1 All ER 597; *Holt v WH Rhodes & Son Ltd* [1949] 1 All ER 478 at 480, CA, per Lord Merriman P; *Gibb v United Steel Cos Ltd* [1957] 2 All ER 110, [1957] 1 WLR 668. As to the duties of an employer to his employee generally see **EMPLOYMENT** vol 39 (2009) PARA 22 et seq.

2 *Savory v Holland, Hannen and Cubitts (Southern) Ltd* [1964] 3 All ER 18, [1964] 1 WLR 1158, CA. See also *Mulready v JH and W Bell Ltd* [1953] 2 QB 117, [1953] 2 All ER 215, CA.

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## (iv) Liabilities of Third Persons

### **A. LIABILITY TO EMPLOYER FOR INJURY TO EMPLOYEE**

#### **715. No right in employer to recover in respect of injury to employee.**

An employer has no right to recover damages against the wrongdoer in respect of the loss of services which he sustains when an employee is injured<sup>1</sup>. The former exception to this rule in the case of domestic servants in the action known as *per quod servitium amisit* has been abolished by statute<sup>2</sup>.

1 *Taylor v Neri* (1795) 1 Esp 385 (manager of place of entertainment not entitled to recover for loss of services of performer); *A-G for New South Wales v Perpetual Trustee Co (Ltd)* [1955] AC 457, [1955] 1 All ER 846, PC; *IRC v Hambrook* [1956] 2 QB 641, [1956] 3 All ER 338, CA; *Metropolitan Police District Receiver v Croydon Corpn, Monmouthshire County Council v Smith* [1957] 2 QB 154, [1957] 1 All ER 78, CA; *Lee v Sheard* [1956] 1 QB 192, [1955] 3 All ER 777, CA; *West Bromwich Albion Football Club Ltd v El-Safty* [2006] EWCA Civ 1299, 92 BMLR 179, [2007] PIQR P76.

2 See the Administration of Justice Act 1982 s 2(c)(i); and PARA 429.

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### **B. LIABILITY TO EMPLOYEE**

#### **716. Nature of employee's rights.**

An employee who has suffered injury resulting from the act or omission of a third person can recover damages in tort against that person provided only that he can show that the third person has been guilty of a tort to him personally<sup>1</sup>. Thus if an employee is injured by reason of a latent defect in a tool purchased by his employer for his use, he may be entitled to recover damages against the manufacturers of the tool on the principle<sup>2</sup> that if a manufacturer sells an article in such form as to show that it is intended to reach the ultimate user in the form in which it left the manufacturer with no reasonable possibility of intermediate examination, the manufacturer owes a duty to the ultimate user to take reasonable care in the manufacture of the article so that it will not result in injury to the user<sup>3</sup>. Where, however, the third person owes a duty to the employer only, its violation confers no rights upon the employee even though he may sustain injury thereby. Thus an employee who is in occupation of premises on his employer's behalf cannot maintain an action against a trespasser, since he has himself no estate in the premises, it being immaterial that he may have been allowed by his employer to use the premises for his own business<sup>4</sup>.

1 *Thrussell v Handyside* (1888) 20 QBD 359, DC; *Parry v Smith* (1879) 4 CPD 325. The fact of the employee's employment may affect the measure of the damages which he is entitled to recover: see eg *Lee v Sheard* [1956] 1 QB 192, [1955] 3 All ER 777, CA (plaintiff held entitled to recover, as damages for negligence, decrease in remuneration from limited company owing to its profits being diminished by reason of his absence owing to defendant's negligence). For the right to recover loss of earnings in an action for personal injuries see generally **DAMAGES** vol 12(1) (Reissue) PARAS 885-890 et seq. As to the deduction from such damages of tax which the employee would have had to pay if he had received the earnings see **EMPLOYMENT** vol 40 (2009) PARA 786. See also **DAMAGES** vol 12(1) (Reissue) PARA 901.

2 See eg *M'Alister (or Donoghue) v Stevenson* [1932] AC 562, HL; and **NEGLIGENCE**.

3 See eg *Davie v New Merton Board Mills Ltd* [1958] 1 QB 210, [1958] 1 All ER 67, CA; affd [1959] AC 604, [1959] 1 All ER 3 46, HL. For the employer's statutory liability in such circumstances see the Employer's Liability (Defective Equipment) Act 1969 s 1(1); and PARA 675.

4 *White v Bayley* (1861) 10 CBNS 227.

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### **717. Circumstances in which the employee must have been acting in the course of his employment.**

In order to establish a breach of duty towards the employee it may in certain cases be necessary to consider whether he was acting in the course of his employment. The facts of the case may show that the third person owed a duty not only to the employer but also to the employees engaged on his behalf<sup>1</sup>.

1 *Parry v Smith* (1879) 4 CPD 325; *Elliott v Hall* (1885) 15 QBD 315, DC. Where the employee is sent to work on the premises of another, the care that the latter must exercise as occupier is to be assessed in the light of the expectation that a person in the exercise of his calling will appreciate and guard against any risks ordinarily incident to it: see the Occupiers' Liability Act 1957 s 2(3)(b); *Roles v Nathan* [1963] 2 All ER 908, [1963] 1 WLR 1117, CA. In such a case, the employer remains under an obligation to provide a safe system of work (*Garcia v Harland & Wolff Ltd* [1943] 1 KB 731, [1943] 2 All ER 477), and may incur a joint liability with the occupier for the employee's injury.

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## **(3) PUBLIC AUTHORITIES**

### **718. In general.**

Unless the contrary is provided by statute<sup>1</sup>, public authorities<sup>2</sup> have the same duties and are subject to the same liabilities as the general law imposes on private persons doing the same things<sup>3</sup>, as well as certain additional duties and liabilities that are imposed on them by common law or statute<sup>4</sup>, notably the common law tort of misfeasance in public office<sup>5</sup> and the duty of a 'public authority' to act in a way which is compatible with specified rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>6</sup> under the Human Rights Act 1998<sup>7</sup>.

Though public servants, agents and officers are not liable in a representative capacity for their torts, they remain personally liable for their tortious acts or omissions<sup>8</sup> and their employer<sup>9</sup> may be vicariously liable if such acts or omissions are done in the exercise of their authority or course of their employment<sup>10</sup>.

1 As to statutory authority generally see PARA 457.

2 As under the Human Rights Act 1998 s 6(3), the term is used here to include any person certain of whose functions are functions of a public nature. As to the liability of the Crown see the Crown Proceedings Act 1947; and PARA 418.

3 *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93. See PARA 419; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 9.

4 As to the liability of public authorities in respect of the exercise of statutory powers see PARAS 720-721.

5 See PARA 719.

6 See the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969); PARA 721; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq.

7 See PARA 721.

8 *Raleigh v Goschen* [1898] 1 Ch 73; *Mackenzie-Kennedy v Air Council* [1927] 2 KB 517 at 532, CA, per Atkin LJ.

9 Vicarious liability also rests on the Crown for torts committed by Crown servants or agents (Crown Proceedings Act 1947 s 2(1)(a); see also PARA 701) and on the chief officer of police for a police area for torts committed by constables under his direction and control in the performance or purported performance of their functions (Police Act 1996 s 88(1); see also PARA 699).

10 As to vicarious liability for employees generally see PARA 680 et seq.

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## 719. Misfeasance in public office.

The elements of the tort of misfeasance in public office are<sup>1</sup>:

- 48 (1) the defendant is a public officer<sup>2</sup>;
- 49 (2) the exercise of power as a public officer<sup>3</sup>;
- 50 (3) the defendant's state of mind is such as to constitute either targeted malice (that is, conduct specifically intended to injure a person or persons)<sup>4</sup>, or knowledge<sup>5</sup> that he has no power to do the act complained of and that the act will probably injure the claimant<sup>6</sup>;
- 51 (4) the claimant has a sufficient interest to found a legal standing to sue<sup>7</sup>;
- 52 (5) causation<sup>8</sup>;
- 53 (6) the claimant suffers loss<sup>9</sup> that the defendant actually foresaw as a probable consequence<sup>10</sup>.

1 See *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1 at 8-12, HL, per Lord Steyn. See also *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [42], [2003] 2 AC 1 at [42], [2001] 2 All ER 513 at [42] per Lord Hope of Craighead, and at [121] per Lord Hutton. The liability may be traced back to *Turner v Sterling* (1671) 2 Vent 25. The tort was considered well-established in *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172, [1981] 1 All ER 1202 at 1210, PC.

2 'Public officer' includes a public body: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1 at 8, HL, per Lord Steyn; *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [126], [2003] 2 AC 1 at [126], [2001] 2 All ER 513 at [126] per Lord Hutton. See also *Henly v Mayor and Burgesses of Lyme* (1828) 5 Bing 91 at 107-108 per Best CJ; *Dunlop v Woollahra Municipal Council* [1982] AC 158, [1981] 1 All ER 1202, PC; *Jones v Swansea City Council* [1990] 3 All ER 737, [1990] 1 WLR 1453, HL (local authority exercising private law functions as a landlord). A public body may also be liable vicariously for the misfeasance of its employee: *Racz v Home Office* [1994] 2 AC 45, [1994] 1 All ER 97, HL.

A public officer is a person who exercises governmental power and the term does not apply to a commercial operation concerned with the internal commercial interests of its own members, even if it regulates its members' activities: *Society of Lloyd's v Henderson* [2007] EWCA Civ 930, [2008] 1 WLR 2255, [2008] Lloyd's Rep IR 317.

3 The exercise of power includes the procuring of the making of a compulsory purchase order (*Smith v East Elloe RDC* [1956] AC 736 at 752-753, [1956] 1 All ER 855 at 859-860, HL, per Viscount Simonds), and the refusal or cancellation, or procuring of the cancellation, of a licence (*David v Abdul Cader* [1963] 3 All ER 579, [1963] 1 WLR 834, PC; *Roncarelli v Duplessis* [1952] 1 DLR 680; for further proceedings see [1959] SCR 121, 16 DLR (2d) 689, Can SC). But a police officer who makes a false report about the suspect of an investigation is not exercising a power, so cannot be liable for misfeasance in public office, though he may incur liability in defamation: *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 at 1240-1241, [1989] 1 All ER 1025 at 1032, HL, per Lord Bridge of Harwich.

The exercise of power may be by positive act or omission, but in the case of an omission there must be a legal duty to act and a failure to act which amounts to an unlawful breach of that duty; mere inadvertence or oversight is insufficient: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 228, [2000] 3 All ER 1 at 41, HL, per Lord Hutton, at 230 and 43 per Lord Hobhouse of Woodborough, and at 237-238 and 49 per Lord Millett. See eg *Henly v Mayor and Burgesses of Lyme* (1828) 5 Bing 91. It is not necessary to show a conscious decision not to act; a deliberate or wilful failure to take a decision will also suffice: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [69], [2003] 2 AC 1 at [69], [2001] 2 All ER 513 at [69] per Lord Hope of Craighead.

4 Targeted malice involves bad faith in the sense of the exercise of public power for an improper or ulterior motive: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 191, [2000] 3 All ER 1 at 7, HL, per Lord Steyn. The intention may be directed at the claimant individually or as a member of a class: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 193, [2000] 3 All ER 1 at 9, HL, per Lord Steyn. Cf *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch), [2005] All ER (D) 160 (Oct) ('targeted malice' not proved).

5 Reckless indifference as to consequences is sufficient: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1, HL. Reckless indifference in a subjective rather than objective sense is required: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 193, [2000] 3 All ER 1 at 9, HL, per Lord Steyn; *Society of Lloyd's v Henderson* [2007] EWCA Civ 930, [2008] 1 WLR 2255, [2008] Lloyd's Rep IR 317; *Dennett v Southwark London Borough Council* [2007] EWCA Civ 1091, [2008] LGR 94, [2008] HLR 23. Subjective recklessness entails wilful disregard of the risk: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 231, [2000] 3 All ER 1 at 44, HL, per Lord Hobhouse of Woodborough. See also *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16 at [46], [2003] 2 AC 1 at [46], [2001] 2 All ER 513 at [46] per Lord Hope of Craighead. An institution can only be reckless subjectively if one or more individuals acting on its behalf are subjectively reckless, and their subjective state of mind needs to be established; to that end, they need to be identified: *Southwark London Borough Council v Dennett* [2007] EWCA Civ 1091 at [21], [2008] LGR 94 at [21], [2008] HLR 369 at [21] per May LJ; see also *Society of Lloyd's v Henderson* [2007] EWCA Civ 930 at [49], [2008] 1 WLR 2255 at [49], [2008] Lloyd's Rep IR 317 at [49] per Buxton LJ.

6 This state of mind involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 191, [2000] 3 All ER 1 at 7, HL, per Lord Steyn. See also at 223 and 36 per Lord Hutton, at 231 and 43-44 per Lord Hobhouse of Woodborough. Cf at 235 and 48 per Lord Millett, who considered that the element of knowledge was a way of establishing by inference the necessary intention to injure, not a substitute for it. Cases falling into this category include *Ashby v White* (1703) 2 Ld Raym 938 and subsequent cases on the discretionary refusal of voting rights (see *Drewe v Coulton* (1787) 1 East 563; *Cullen v Morris* (1819) 2 Stark 577; *Tozer v Child* (1857) 7 E & B 377) and several cases involving malicious acts of inferior court judges within their jurisdiction (see *Harman v Tappenden* (1801) 1 East 555; *Ackerley v Parkinson* (1815) 3 M & S 411; *Taylor v Nesfield* (1854) 3 E & B 724). See also *Bourgoin SA v Minister of Agriculture, Fisheries and Food* [1986] QB 716, [1985] 3 All ER 585, CA.

The term 'dishonesty' is sometimes used by way of alternative to 'bad faith' but the former in some contexts implies a financial motive, so the latter is preferable: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 227-228, [2000] 3 All ER 1 at 40-41, HL, per Lord Hutton.

7 If the public officer knows that his unlawful conduct will probably injure another person, or is reckless as to the consequence, the claimant does not need to show any other link or relationship between himself and the officer before liability can arise: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 228, [2000] 3 All ER 1 at 41, HL, per Lord Hutton. In such a case, it is immaterial whether the defendant knows at the relevant time of the risk to the claimant or to a particular class of which the claimant is or becomes a member; what matters is his knowledge of the risk to someone: *Akenzua v Secretary of State for the Home Department* [2002] EWCA Civ 1470, [2003] 1 All ER 35, [2003] 1 WLR 741.

8 Causation is a question of fact: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 194, [2000] 3 All ER 1 at 9, HL, per Lord Steyn. As to causation generally see PARA 417.

9 The tort of misfeasance in public office is not actionable per se: *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353. The claimant must suffer damage that is specific to him and not suffered in common with the public in general: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 231, [2000] 3 All ER 1 at 44, HL, per Lord Hobhouse of Woodborough. Actionable damage includes not just physical harm (*Akenzua v Secretary of State for the Home Department* [2002] EWCA Civ 1470, [2003] 1 All ER 35, [2003] 1 WLR 741), but also pure economic loss (*Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1, HL) and loss of liberty, including the residual liberty of a person who is lawfully imprisoned (*Karagozlu v Metropolitan Police Comr* [2006] EWCA Civ 1691, [2007] 2 All ER 1055, [2007] 1 WLR 1881). Mental injury falling short of a psychiatric condition will not suffice: *Hussain v Chief Constable of West Mercia Constabulary* [2008] EWCA Civ 1205, (2008) Times, 17 November, [2008] All ER (D) 06 (Nov). The mere invasion of a constitutional right does not constitute actionable damage: *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395, [2006] 2 All ER 353.

10 It is not sufficient that the loss was a reasonably foreseeable consequence of the relevant acts or omissions: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 194-195, [2000] 3 All ER 1 at 11, HL, per Lord Steyn, and at 236 and 49 per Lord Millett.

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## 720. Negligence in relation to statutory powers.

A public authority's negligence may give rise to a cause of action in the tort of negligence<sup>1</sup>, in circumstances where a duty of care is owed<sup>2</sup>, or take away a defence of statutory authority that would otherwise have arisen in respect of some other tortious cause of action<sup>3</sup>. No liability in tort can arise from acts done in pursuance, and within the scope, of statutory powers where the powers are exercised in good faith, reasonably, without negligence and for the purpose for which, and in the manner which, the statute provides<sup>4</sup>. The protection of the statute is lost, however, if the public authority fails to exercise its powers with reasonable care<sup>5</sup> so as to avoid unnecessary interference with private rights<sup>6</sup>.

1 As to liability in the tort of negligence generally see **NEGLIGENCE**.

2 As to the circumstances when a public authority will owe a duty of care in respect of its statutory duties and powers see **NEGLIGENCE** vol 78 (2010) PARA 17 et seq. As to liability in the tort of negligence for failure to exercise a statutory power see **NEGLIGENCE** vol 78 (2010) PARA 19. As to liability for breach of statutory duty see PARA 495 et seq, with particular reference to public authorities at PARA 502.

3 As to statutory authority see also PARA 457.

4 *Vaughan v Taff Vale Rly Co* (1860) 5 H & N 679; *Hammersmith and City Rly Co v Brand* (1869) LR 4 HL 171; *Dunne v North Western Gas Board* [1964] 2 QB 806, [1963] 3 All ER 916, CA; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, [1981] 1 All ER 353.

5 As to reasonable care see **NEGLIGENCE**.

6 *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, HL; *Metropolitan Asylum District Managers v Hill* (1881) 6 App Cas 193, HL. As to the defence of statutory authority in the law of nuisance see **NUISANCE** vol 78 (2010) PARA 192.

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## 721. Liability under Human Rights Act 1998.

Under the Human Rights Act 1998<sup>1</sup>, it is unlawful for a 'public authority'<sup>2</sup> to act in a way which is incompatible with a right guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>3</sup> which has been incorporated into domestic law by the Act<sup>4</sup>. A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful as described above may bring proceedings against the authority in the appropriate court or tribunal, but only if he is (or would be) a victim of the unlawful act<sup>5</sup>. In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate<sup>6</sup>. But no award of damages may be made unless, taking account of all the circumstances of the case, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made<sup>7</sup>.

In some circumstances, the Act imposes a positive obligation on public authorities to take steps to protect the Convention rights by intervening to prevent one person from causing harm to another, as where there is a real and immediate risk to life, and liability may be imposed under the Act where there is an unreasonable failure to comply with this positive obligation<sup>8</sup>.

1 Human Rights Act 1998 s 6(1). The relevant provisions of the Act came into effect on 2 October 2000: see the Human Rights Act 1998 (Commencement No 2) Order 2000, SI 2000/1851, art 2.

2 Under the Human Rights Act 1998, 'public authority' includes a court or tribunal, and any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: s 6(3).

3 I.e. the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 103 et seq.

4 See the Human Rights Act 1998 s 1, Sch 1 (s 1 amended by SI 2003/1887 and SI 2004/1574; Human Rights Act 1998 Sch 1 amended by SI 2004/1574); and see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 101 et seq. These rights are in addition to, and not in substitution for, existing rights: see the Human Rights Act 1998 s 11.

5 See the Human Rights Act 1998 s 7(1). For the purposes of s 7, a person is a victim of an unlawful act only if he would be a victim for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms art 34 if proceedings were brought in the European Court of Human Rights in respect of that act: Human Rights Act 1998 s 7(7). Damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings: s 7(2).

6 See the Human Rights Act 1998 s 8(1).

7 See the Human Rights Act 1998 s 8(3). See further *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124, [2004] 1 All ER 833.

8 The real and immediate risk test adopted by the European Court of Human Rights in *Osman v United Kingdom* (App no 23452/94) (2000) 29 EHRR 245 was applied and considered in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [2008] 3 All ER 977 (police); *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] 1 AC 691, [2009] 1 All ER 1053 (suicide by person detained under mental health legislation); *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874, [2009] 3 All ER 205 (fatal quarrel between neighbours in local authority accommodation).